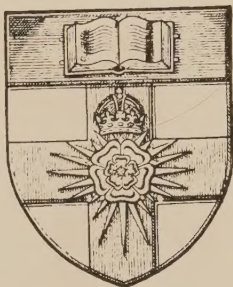


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1935.

THE
LAW REPORTS

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LAW REPORTS

OF THE COURTS OF COMMON LAW AND EQUITY

HOUSE OF LORDS

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

PER RAGL CASES



JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1934.

Dec. 5. This day THE RIGHT HON. STANLEY OWEN, VISCOUNT BUCKMASTER, P.C., G.C.V.O., sometime Lord Chancellor, died at his residence, 1, Porchester Terrace, W., aged 73.

1935.

Jan. 11. This day THE HON. SIR ALEXANDER DINGWALL BATESON, a Justice of His Majesty's High Court of Justice, Probate, Divorce, and Admiralty Division, died at his residence, 30, Phillimore Gardens, W., aged 68.

Jan. 23. ALFRED TOWNSEND BUCKNILL, ESQ., O.B.E., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division in the place of Mr. Justice Bateson deceased, and was afterwards knighted.

Feb. 13. GEORGE MALCOLM HILBERY, ESQ., K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.

Feb. 13. SIR WALTER GREAVES-LORD, K.C., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division.

Apr. 2. THE RIGHT HON. SIR GEORGE CLAUS RANKIN, lately Chief Justice of the High Court of Judicature at Calcutta, was appointed to be a member of the Judicial Committee of the Privy Council in pursuance of section 2 of the Appellate Jurisdiction Act, 1908.

June 7. This day THE RIGHT HON. DOUGLAS MCGAREL, VISCOUNT HAILSHAM received the Great Seal and took the Oath of Office as Lord High Chancellor of Great Britain in succession to The Right Hon. Viscount Sankey, who had resigned the office.

June 13. This day THE RIGHT HON. SIR HORACE EDMUND AVORY, a Justice of His Majesty's High Court of Justice, King's Bench Division, died at Rye, Sussex, aged 83.

June 21. WILFRID HUBERT POYER LEWIS, ESQ., O.B.E., was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Mr. Justice Avory, and was afterwards knighted.

Aug. 12. This day THE RIGHT HON. LORD TOMLIN OF ASH, a Lord of Appeal in Ordinary, died at Canterbury, aged 68.

Oct. 7. WILFRID ARTHUR GREENE, ESQ., K.C., was appointed to be a Lord Justice of Appeal in succession to the Right Hon. Sir Frederic Herbert Maugham, appointed a Lord of Appeal in Ordinary.

Oct. 7. THE RIGHT HON. ROBERT ALDERSON, BARON WRIGHT, a Lord of Appeal in Ordinary, was appointed to be Keeper or Master of the Rolls and Records of the Chancery of England in the place of the Right Hon. Lord Hanworth, who resigned the office on account of ill health.

MEMORANDA—continued.

1935.

- Oct. 12. THE RIGHT HON. SIR FREDERIC HERBERT MAUGHAM, one of the Lords Justices of Appeal, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act, 1876, in succession to the late Lord Tomlin. Sir Frederic Maugham was granted the dignity of a Baron for life by the style and title of Baron Maugham of Hartfield in the County of Sussex.
- Oct. 14. THE RIGHT HON. SIR LESLIE FREDERIC SCOTT, K.C., was appointed to be a Lord Justice of Appeal in succession to the Right Hon. Sir Alexander Adair Roche.
- Oct. 16. THE RIGHT HON. SIR ALEXANDER ADAIR ROCHE, one of the Lords Justices of Appeal, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act, 1876, in succession to the Right Hon. Lord Wright. Sir Alexander Roche was granted the dignity of a Baron for life by the style and title of Baron Roche of Chadlington in the County of Oxford.
- Oct. 22. This day THE RIGHT HON. LORD CARSON OF DUNCAIRN, sometime a Lord of Appeal in Ordinary, died at Cleve Court, Minster, aged 81.
- Oct. 24. THE RIGHT HON. SIR GEORGE CLAUS RANKIN was appointed to be a member of the Judicial Committee of the Privy Council under provisions of the Appellate Jurisdiction Act, 1929, in the place of the Right Hon. Sir Lancelot Sanderson, K.C., who had retired.
- Oct. 25. This day LORD JUSTICE GREENE was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council and took his place at the Board accordingly, and the honour of knighthood was conferred upon him.
- Oct. 25. THE RIGHT HON. JAMES RICHARD, BARON ATKIN, a Lord of Appeal in Ordinary, was appointed to be a Member of the Universities Committee of the Privy Council, in accordance with the provisions of the Universities of Oxford and Cambridge Act, 1877.
- Oct. 27. This day THE RIGHT HON. HENRY BURTON, BARON WRENBURY OF OLD CASTLE, sometime a Lord of Appeal in Ordinary, died at 7, Melbury Road, W.14, aged 90.
- Dec. 31. This day THE RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C., who was appointed Editor-in-chief of the Law Reports Feb. 1, 1895, and sole Editor, Feb. 1, 1916, retired.

ERRATA.

<i>Page</i>	<i>Line</i>	
31	5 from bottom.	Sir Henry Wynne is a member both of the English Bar and the Irish Bar.
		<i>For</i> <i>Read</i>
326	7 of text.	C. H. Gurney. C. H. Grundy.

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

M'GILLIVRAY		APPELLANT ; H. L. (Sc.)*
	AND	
HOPE AND ANOTHER		RESPONDENTS.

1934
June 21.

Workmen's Compensation—Industrial Disease—Silicosis—Total Disablement—Claim for Compensation—Liability of last employer—Contribution from former employers—Bankruptcy of last employer—Claim by trustee for contribution before payment—Various Industries (Silicosis) Scheme, 1928 (Statutory Rules and Orders, 1928, No. 974), cl. 9—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 7, sub-s. 3 ; s. 47.

The Various Industries (Silicosis) Scheme, 1928, was made under s. 47 of the Workmen's Compensation Act, 1925. Clause 4 of the Scheme provides that where a certifying surgeon certifies that a workman is totally disabled for work owing to silicosis due to employment in certain processes, compensation shall be payable as if the disease were a personal injury by accident.

By cl. 9 of the Scheme "The compensation shall be claimed and recoverable from the employer who last employed the workman

* *Present* : LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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in the processes; but any other employers who employed the workman during the five years preceding the date of total disablement shall . . . be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined by arbitration."

A workman, who fulfilled the conditions of cl. 4 of the Scheme, had been employed by three employers consecutively within the five years preceding his total disablement in the processes to which the disablement was due. In an arbitration under the Workmen's Compensation Act, 1925, between the workman and his last employer, the two former employers appeared in respect of their several interests and an award for weekly payments in favour of the workman was made against the last employer. Before any payment had been made under the award the last employer became bankrupt in Scotland; his estates were sequestrated, and the trustee on the sequestration appeared in the arbitration in place of the last employer. The lump sum representing the amount due in respect of the weekly payments having been ascertained in accordance with s. 7, sub-s. 3, of the Workmen's Compensation Act, 1925, the trustee, before any payment had been made in respect thereof, claimed from the two former employers contributions towards the amount:—

Held, on the true construction of cl. 9 of the Scheme, that contribution is only payable towards the amount of compensation actually paid; and that, no compensation having been paid, no contribution was due.

Collinge v. Heywood (1839) 9 A. & E. 633, approved.

Interlocutor of the Court of Session, sub nom. *Henry v. Gladstone* 1933 S. C. 283, affirmed.

APPEAL from a judgment of the Second Division of the Court of Session (reported 1933 S. C. 283) pronounced, after consulting with three additional judges by virtue of s. 60 of the Court of Sessions Act, 1868, upon a case stated by the Sheriff-Substitute of the Sheriffdom of Dumfries and Galloway at Dumfries.

On March 17, 1930, Walter Henry, a mason, commenced arbitration proceedings against William Gladstone, a builder, under the Workmen's Compensation Act, 1925, and the Various Industries (Silicosis) Scheme, 1928, having been certified to be suffering from silicosis and to have been thereby totally disabled for work since September 15, 1929.

The Scheme, which was made under s. 47 of the Workmen's Compensation Act, 1925, provides by cl. 4 that, where the certifying surgeon certifies that a workman is totally disabled

for work owing to silicosis due to employment in certain processes, compensation shall be payable as if the disease were a personal injury by accident. Cl. 9 of the Scheme provides: "The compensation shall be claimed and recoverable from the employer who last employed the workman in the processes; but any other employers who employed the workman in the processes during the five years preceding the date of total disablement shall . . . be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined by arbitration." . . .

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Other employers who had employed the workman in the processes specified in cl. 2 of the Scheme within five years before the date of total disablement were John Glasgow Hope, builder, and William Bell, builder. These employers were notified of the arbitration and appeared in the process.

By s. 7, sub-s. 3, of the Workmen's Compensation Act, 1925 (which deals with the bankruptcy of an employer) the amount due in respect of compensation is included amongst the debts which, under s. 118 of the Bankruptcy (Scotland) Act, 1913, are to be paid in priority to all other debts. Sect. 7, sub-s. 3, of the Workmen's Compensation Act, 1925, further provides that "Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under this Act."

On May 14, 1931, an award was made ordering William Gladstone to pay compensation at the rate of 1*l.* 10*s.* a week beginning from September 21, 1929, for the week immediately preceding; and the arbitration was adjourned to consider the liability inter se of William Gladstone, John Glasgow Hope, and William Bell in respect of the compensation due to the workman.

Before William Gladstone had made any payment under the award, his estates were sequestrated on August 7, 1931, on a petition presented by the workman on July 7, 1931,

H. L. (Sc.) in the Sheriff-Court, Dumfries. The appellant, Alexander
 1934 M'Gillivray, was appointed trustee. William Gladstone had
 not entered into a contract with any insurers in respect of
 any liability under the Various Diseases (Sickness) Scheme, 1928.
 RAY
 Hope.

At the date of the sequestration a sum of 127*l.* 5*s.* was due as compensation under the award. A further sum of 67*l.* 18*s.* 4*d.* represents the amount of the lump sum for which the weekly payment of 1*l.* 10*s.* could be redeemed if the employer made an application for that purpose under the Workmen's Compensation Act, 1925. The sums together amount to 827*l.* 1*s.* 4*d.*

The appellant called upon Hope and Bell, the former employers, to contribute respectively the sums of 52*l.* 18*s.* 4*d.* and 9*l.* 17*s.* 11*d.* towards the 827*l.* 1*s.* 4*d.* above mentioned. No sum had been paid or set apart for the workman from the sequestered estates of William Gladstone in respect of the compensation payable under the award.

The appellant then applied in the arbitration proceedings under the Workmen's Compensation Act, 1925, for an award ordering the respondents Hope and Bell to pay to him the respective sums. The arbitration was heard by the Sheriff-Substitute, who held that it was not competent for him to make an order for lump sum payments, and refused the application, subject to a case stated, which set out the foregoing facts and submitted to the Court the questions, whether he was right in refusing to order the respondents to make contributions:—

(1.) towards the lump sum for which compensation could have been redeemed at the date of the last employer's sequestration;

(2.) towards the amount of arrears of compensation due at the date of the sequestration and still unpaid;

(3.) even as weekly payments except in relief of sums actually paid by the applicant.

The Court of Session by a majority answered all the questions in the affirmative.

The applicant appealed.

1934. April 17. *R. Gibson K.C.* and *James Walker* for the appellant. H. L. (Sc.)

April 19. *John Carment K.C.* and *W. R. Walker* for the respondents. ¹⁹³⁴
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The House took time for consideration.

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JUNE 21. LORD TOMLIN (read by LORD THANKERTON). My Lords, this is an appeal against a judgment of the Second Division of the Court of Session pronounced (after consulting with three additional judges by virtue of s. 60 of the Court of Session Act, 1868) upon a stated case in an arbitration under the Workmen's Compensation Act, 1925.

The arbitration originated between a workman named Mason and his last employer, William Gladstone. In the arbitration the workman's two previous employers, the present respondents, compeared for their respective interests. Weekly payments of 30s. by way of compensation were on May 14, 1931, awarded in favour of the workman against Gladstone as from September 21, 1929, and the arbitration was continued to determine the liability of the three employers inter se for the compensation due and payable.

While the arbitration was pending, namely, on August 7, 1931, Gladstone became bankrupt and was sequestrated. Gladstone was uninsured in respect of his liability and no payment on account of the compensation had been made by him before the sequestration.

The present appellant having been appointed trustee in the sequestration compeared in the arbitration in place of the bankrupt.

In the subsequent proceedings in the arbitration a stated case was prepared by the Sheriff-Substitute upon the requisition of the appellant.

In order to understand the questions raised by the stated case and what followed thereon it is necessary to set out some further facts. The workman, who had been employed since a date earlier than January 1, 1929, in one of the processes mentioned in the Scheme to which I am about to refer, was certified to be suffering from silicosis and to have

H. L. (Sc.) been totally disabled for work since September 15, 1929.
 1934 His claim for compensation therefore was put forward under
 M'GILLIV- the Act and the Various Industries (Silicosis) Scheme, 1928.
 RAY That Scheme came into force on February 1, 1929, and applied
 v. to all workmen employed in certain processes on or after
 HOPE. January 1, 1929.
 Lord Tomlin.

The Scheme, which was made by the Secretary of State pursuant to the powers conferred on him by s. 47 of the Act, contains (inter alia) the following provisions:—

“ PART I.—RIGHT TO COMPENSATION.

“ 4.—(1.) Where the certifying surgeon certifies in pursuance of this Scheme that a workman is totally disabled for work from silicosis or from silicosis accompanied by tuberculosis ; . . . and where the disease is due to employment in the processes whether under one or more employers, compensation shall be payable to the workman during such disablement or to his dependants, as the case may be, as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Act, but subject to the modifications hereinafter contained. . . .

“ 9. The compensation shall be claimed and recoverable from the employer who last employed the workman in the processes ; but any other employers who employed the workman in the processes during the five years preceding the date of total disablement shall (unless they had at the commencement of this Scheme ceased to carry on the said processes) be liable to make to the employer from whom compensation is recoverable, such contributions as, in default of agreement, may be determined by arbitration under this Scheme.

“ Provided that no employer shall be liable to make any such contribution in respect of any period of employment more than twelve months previous to the commencement of this Scheme.

“ PART II.—AMOUNT OF COMPENSATION.

“ 10. The compensation payable under this Scheme shall

be fixed in accordance with the provisions contained in the Act under the head "Amount of Compensation" (sections 8 to 13 inclusive) for fixing the compensation in cases of death and total disablement and the said sections shall apply accordingly, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer from whom compensation is recoverable under this Scheme.

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"PART V.—MISCELLANEOUS PROVISIONS.

"18. The following provisions of the Act shall so far as applicable apply to any case under this Scheme in like manner as in cases under the Act:—

"(b) Section 7.—Provision as to cases of bankruptcy of employer."

The material provisions of s. 7 of the Act relating to an uninsured employer are contained in sub-s. 3 of that section and are as follows:—

"(3.) There shall be included amongst the debts which—

(i) Under section thirty-three of the Bankruptcy Act, 1914, and section one hundred and eighteen of the Bankruptcy (Scotland) Act, 1913, are in the distribution of the property or assets of a bankrupt, to be paid in priority to all other debts;

the amount due in respect of any compensation or liability for compensation accrued before the date of the receiving order;

"Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under this Act."

The stated case found amongst other things that at the date of the sequestration a sum of 147*l.* 5*s.* was due in respect of arrears of weekly payments under the award and that a further sum of 679*l.* 16*s.* 4*d.* represented the amount of the lump sum for which the weekly payments could be redeemed

H. L. (Sc.) if Gladstone made an application for that purpose under the
 1934 Act, and that no sum had been paid or set apart for the
 M'GILLIV- workman from the sequestrated estates of Gladstone in
 RAY respect of the compensation payable under the award.

HOPE. The case further found that the only employers who
 Lord Tomlin. employed the workman between February 1, 1929, when the
 Scheme came into force, and September 14, 1929, the date
 of the workman's total disablement, were Gladstone and
 the respondents, and that the periods of the workman's
 employment with these persons were: with Gladstone,
 884 hours; with the respondent Hope, 2226 hours; with
 the respondent Bell, 384 hours; and that the amount of
 the contributions due fell to be based upon the respective
 lengths of the periods of the several employments.

In these circumstances the appellant claimed to be paid
 as contributions to the sum of 827*l.* 1*s.* 4*d.* (the aggregate
 of the two sums of 147*l.* 5*s.* and 679*l.* 16*s.* 4*d.*) the sum of
 526*l.* 18*s.* 4*d.* from the respondent Hope and the sum of
 90*l.* 17*s.* 11*d.* from the respondent Bell as their proportions
 of the 827*l.* 1*s.* 4*d.* based upon the respective periods of the
 workman's employment with them.

The Sheriff-Substitute held that it was not competent
 for him to make an order for payment and framed certain
 questions of law for the opinion of the Court. These questions
 were not regarded as satisfactory by the Court and the matter
 was sent back to the Sheriff-Substitute to deal with on the
 footing of certain adjusted questions. On the remit to him
 the Sheriff-Substitute found that the findings of fact already
 pronounced were appropriate to the adjusted questions of
 law and in effect adhered to the conclusion which he had
 previously reached.

The adjusted questions of the stated case which it then
 fell to the Second Division of the Court of Session to deal
 with were three in number and in the following terms:—

Question 1.—On the facts stated, was I entitled to refuse
 to ordain the compearing respondents to make to the minuter,
 as trustee for the workman's last employer, contributions
 towards the lump sum for which the compensation could have

been redeemed by him as at the date of the last employer's sequestration ? H. L. (Sc.)

Question 2.—On the facts stated, was I entitled to refuse to ordain the compearing respondents to make to the minuter, as trustee of the workman's last employer, contributions towards the amount of the arrears of compensation due to the workman as at the date of the sequestration of the last employer, which are still unpaid ?

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Question 3.—On the facts stated, was I entitled to refuse to ordain the compearing respondents to make any contributions, even as weekly payments, to the minuter, as trustee for the last employer, except in relief of sums actually paid by the said minuter to the workman ?

When the matter came again before the Court, the Second Division of the Court of Session sat with three judges of the First Division to dispose of it, and a marked difference of opinion among the judges was disclosed. The Lord President and Lord Sands were in favour of the appellant and would have answered the three questions in the negative. The Lord Justice-Clerk and Lord Hunter agreed with the arbitrator. Lord Anderson answered the first two questions in the affirmative and the third question in the negative. Lord Morison was of opinion that the Sheriff-Substitute was right in rejecting the appellant's claim, but considered that the respondents were under some direct liability to the workman. Lord Murray answered each of the three questions in the affirmative. In the result therefore the three questions were by a majority answered in the affirmative and the appellant's claim accordingly failed.

While appreciating the difficulties of a case which has given rise to so much difference of opinion below, I have reached a clear conclusion upon it. I have no doubt upon the true construction of cl. 9 of the Scheme (1.) that the last employer is the only person who is under liability to the workman for the compensation ; and (2.) that the provision whereby the last employer is able to recover something in respect of the compensation from previous employers is for the benefit and protection of the last employer, and not for

H. L. (Sc.) the benefit of the workman. I am also of opinion that the words "such contributions as in default of agreement may be determined by arbitration" do not mean "contributions" in the strict sense of that word, that is to say "sums provided to make up the amount payable to the workman," but mean such sums by way pro tanto of indemnity to the last employer for what he has paid for compensation as in default of agreement may be determined by arbitration.

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Further, under the English law, where one who is liable to pay a sum of money to another is entitled against a third party to be indemnified in whole or in part against what he has so to pay, he cannot recover on the indemnity against this third party where he himself has made no payment in respect of his own liability (see *Collinge v. Heywood* (1)), and no suggestion was made to your Lordships that in this regard the Scots law differs from the English law.

Applying these considerations to the facts of the present case, it seems plain that as no payment has ever been made in respect of the compensation either by the bankrupt or out of his estates in the sequestration, the appellant is not at present in a position to make under the Scheme any claim to contribution against either of the respondents. It follows from what I have said that in hoc statu the three adjusted questions of the stated case fall to be answered in the affirmative, but this answer must be understood to be made with the qualification that if any payment is hereafter made out of the estates in the sequestration, the right of the appellant against the respondents to such contributions as in default of agreement may be determined by arbitration under the Scheme will arise.

In effect, therefore, in my opinion this appeal fails and should be dismissed with costs.

LORD WARRINGTON OF CLYFFE. My Lords, I have had the advantage of reading and considering the opinion of my noble and learned friend Lord Tomlin, with which I concur, and I should add nothing on my own account but for the

fact that we are differing from some of the learned judges of the Court of Session on a question of considerable importance and, so far as actual decision is concerned, of some novelty.

It is unnecessary for me to restate the facts or to read the several material provisions of the Various Industries (Silicosis) Scheme, 1928, and the Workmen's Compensation Act, 1925.

The appellant is the trustee in the sequestration of William Gladstone, the employer who last employed the workman Henry in the process to his employment in which was due the total disablement certified by the certifying surgeon.

As provided by cl. 9 of the Scheme, compensation has been claimed from and is recoverable from Gladstone as the employer who last employed the workman. As against him weekly payments of 30s. were awarded in May, 1931, but no payment in respect thereof was made, and on August 7, 1931, he became bankrupt, at which time 147*l.* 5s. was due in respect of arrears. There is also due from his estate the sum of 679*l.* 16s. 4*d.* representing the lump sum due in respect of the compensation under the provisions of cl. 18 of the Scheme. No payment has been made by the appellant out of the estate of the bankrupt either in respect of the arrears of the weekly payment or of the lump sum.

The respondents are two other employers who employed the workman in the processes in question during the five years preceding the date of total disablement, and (under cl. 9 of the Scheme) they are respectively liable "to make to" Gladstone "such contributions as in default of agreement may be determined by arbitration under this Scheme." The appellant as the trustee under Gladstone's sequestration claimed to be paid by the two respondents contributions to the two sums above mentioned as their proportions thereof, based upon the periods of the workman's employment by them and Gladstone respectively.

I need not state again the three questions of law ultimately submitted to the Second Division of the Court of Session for decision. The point raised by each is, Can the last employer require payment of contributions from the earlier employers except in respect of sums he has actually paid to the workman?

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With all respect to those who have expressed a contrary opinion I cannot find in the provisions of the Scheme or of the Act of 1925 any indication of an intention on the part of the framers of them respectively to provide a fund for the protection of the workman. The compensation is recoverable from the last employer alone. The other earlier employers are liable to make to him their contributions in due proportion; that is to say he is to be indemnified pro tanto against the liability to the workman, which is that of himself alone. If this be so then the case falls within the authority referred to by my noble and learned friend, and the last employer cannot recover unless and until he has himself made payments to the workman to whom he alone is liable. There is nothing that I can find to indicate that contributions made, so to speak, in anticipation would be in any way set apart for the particular purpose. They would simply form part of the last employer's own moneys, and in the case of a bankrupt be applicable in payment of his debts in due course of administration, and the workman would have to rank with other creditors of like order with himself as a preferred creditor under the provisions of s. 7, sub-s. 3, of the Act of 1925.

I agree with my noble and learned friend that while in hoc statu the three questions should be answered in the negative, this should be qualified as he suggests to meet the case of payments which may hereafter be made in the sequestration.

I agree that the appeal should be dismissed with costs.

LORD THANKERTON. My Lords, the facts of this case and the relevant statutory provisions have been fully stated by my noble and learned friend Lord Tomlin. I would only add that under s. 47 of the Act, in virtue of which the Silicosis Scheme was made, it appears that the whole provisions for compensation, including its scale (except in the case of death or total disablement: see sub-s. 2) and the method of its recovery, are to be contained in the Scheme, which may apply with the necessary modifications any of the provisions of the Act or of any enactment relating to compensation

thereunder. It is for this reason that certain provisions of the Act are expressly incorporated in the Scheme, including s. 7. Clause 4 of the Scheme provides that compensation shall be payable to the workman on the occurrence of the conditions there set forth "as provided by the Act, but subject to the modifications hereinafter contained." In my opinion, this involves (*inter alia*) the supersession of s. 43, sub-s. 1 (c), by clause 9 of the Scheme. I am therefore of opinion that the appellant's claim must be shown by him to fall within the terms of clause 9 of the Scheme along with s. 7 of the Act. The only provision for a lump sum payment—apart from s. 7—is in s. 13 of the Act, and that is conceived in favour of the employer only. I should further add that, as I read s. 7, the provision as to a lump sum applies only in the case of an uninsured bankrupt employer, and does not, as the arbitrator and the Lord President seem to have thought, apply to the case of an insured bankrupt employer.

Consideration of clause 9 of the Scheme, and s. 7 of the Act leads me clearly to the conclusion that, except in the case of a bankrupt last employer, the workman has no right of recovery against any one but the last employer; in the case of a bankrupt last employer who is insured, the liability is transferred to the insurers, and, in the case of one who is uninsured, the workman is entitled to claim against the estate in the hands of the trustee. In other words, the former employers are in no case liable to the workman. But the former employers are, in the words of clause 9, to be "liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined by arbitration under this Scheme."

If the contributions had been towards a payment in respect of which the former employers shared the liability for payment, different considerations might well have arisen, but I find myself unable to read "contributions" in the context of clause 9 as meaning anything but reimbursement of the last employer for payments already disbursed. In other words, the contribution is not to enable a payment to be made for which there is some share of liability on the former employers,

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H. L. (Sc.) but to make good to the last employer the effect of his discharge of his sole liability to the workman. The claim of the last employer is one of indemnity and not one of relief.

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I therefore agree with the motion proposed by my noble and learned friend.

Lord
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I am requested by my noble and learned friend Lord Russell of Killowen to say that he concurs in the opinion of my noble and learned friend Lord Tomlin.

LORD MACMILLAN (read by LORD WRIGHT). My Lords, the right to compensation on the part of the workman in this case depends on the terms of the Various Industries (Silicosis) Scheme, 1928, made by the Secretary of State under s. 47 of the Workmen's Compensation Act, 1925. Under the ninth article of the Scheme a workman disabled by silicosis is entitled to claim and recover compensation from the employer who last employed him in the processes in question. No right is given to the workman to claim or recover compensation from any of his employers other than his last employer. But the last employer being the employer "from whom compensation is recoverable" is given a right to exact contributions from any of the workman's previous employers during the preceding five years.

Once it is appreciated that the Scheme, following in this respect s. 43, sub-s. 1 (c) (iii.), of the Act, establishes no privity between the workman and any of his employers other than his last employer, and that the provision for contributions by the previous employers to the last employer is *res inter alios* so far as the workman is concerned, the questions raised in the present appeal are readily solved. The liability of the previous employer being to make contributions to the last employer and not to the workman, the last employer, if, owing to his bankruptcy, he has paid nothing to the workman, plainly cannot call upon the previous employers to contribute towards recouping him. A contribution to nothing is nothing. It is a condition precedent of the last employer being entitled to recover contributions from the previous employers that he shall himself have paid compen-

sation to the workman. The workman has no concern with any contributions which previous employers may make towards what his last employer has paid him. Such contributions are not themselves of the nature of compensation. They are payments by way of recoupment to the employer who has paid the compensation.

If in the case of an ordinary accident the employer is bankrupt and uninsured the workman, though a preferential creditor, may receive nothing if the bankrupt's estate yields no dividend. In this respect the workman who is disabled by an industrial disease is in no better and no worse position if his employer at the time of his disablement is bankrupt and uninsured. Neither the Act nor the Scheme enables him to recover compensation from his previous employers, and the trustee in bankruptcy of his last employer can only recover from the previous employers on behalf of the general body of creditors (subject to the statutory preferences) sums in relief of what he or the bankrupt has paid by way of compensation.

I accordingly find myself in entire agreement with the views expressed by my noble and learned friend Lord Tomlin, and I concur in the motion that the appeal be dismissed.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, June 21, 1934.

Solicitors for appellant: *W. H. Thompson, agent for W. G. Leechman & Co., Solicitors, Edinburgh.*

Solicitors for respondents: *Monro, Saw & Co., agents for McJerrrow & Stevenson, Solicitors, Lockerbie, J. H. McGowan, Son & Brydon, Solicitors, Dumfries, and Scott & Glover, W. S., Edinburgh.*

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has deprived him of the right, which s. 62 of the Blackpool Improvement Act, 1879, does not purport to do. H. L. (E.)

Order of the Court of Appeal [1933] 2 K. B. 339 reversed ; 1934
order of the King's Bench Division [1933] 1 K. B. 688 restored. MARSHALL

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APPEAL from an order of the Court of Appeal (1), reversing a judgment and order of the King's Bench Division (2) in favour of the appellants upon a case stated by the Court of Quarter Sessions for the County of Lancaster.

The question arose upon s. 62 of the Blackpool Improvement Act, 1879. (3)

The appellants, William Marshall and Rhodes William Marshall (hereinafter called "the applicants"), carried on business as motor coach proprietors in Blackpool and were the owners of No. 1 St. Chad's Road, Blackpool, which abutted on the highway. The appellant William Marshall died on December 19, 1933. His interest was represented by the surviving applicant.

No. 1 St. Chad's Road is at the corner which that road makes with another road called the Promenade. It was formerly a house let in apartments with a garden in front enclosed by a wall with no opening in it for the entrance or exit of vehicles. Around and outside the wall ran a paved and kerbed footpath. The applicants, desiring to make a way for horses and vehicles from their premises to the highway across the footpath, on April 11, 1931, submitted a plan to the Corporation as required by s. 62 of the Blackpool Improvement Act, 1879, and applied for leave to execute the proposed works.

The Corporation raised no objection to the plan as such, or to the dimensions, gradients, kerbing or paving of the proposed communication. They nevertheless refused to give their sanction. The applicants appealed to Quarter Sessions under s. 111 of the Blackpool Improvement Act, 1879, which is in these terms: "Any person deeming himself aggrieved by any order or determination of the Corporation, or of any officer or valuer of the Corporation . . . may appeal (but

(1) [1933] 2 K. B. 339.

(2) [1933] 1 K. B. 688.

(3) The section is set out in the head-note.

H. L. (E.) in cases where application for relief is authorized to be made to the Corporation, then only after such application) to the next practicable Court of Quarter Sessions under and according to the provisions of s. 269 of the Public Health Act, 1875."

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The Court of Quarter Sessions on July 17, 1931, allowed the appeal. The ground of the decision was that in the opinion of the Court the Corporation had misdirected themselves and had taken into account not only the matters specifically mentioned in s. 62 of the Blackpool Improvement Act, 1879, namely, the point at which the proposed communication would cut the footpath, the provision (if any) for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, but also other matters to which no specific reference is made in s. 62 aforesaid.

A special case was stated for the opinion of the King's Bench Division in which the above facts were set out. Upon those facts the appellants contended that the Corporation, the respondents, in arriving at their decision, were not entitled to consider any matters other than those specifically mentioned in s. 62. The respondents contended that their powers were not so limited.

The question for the opinion of the Divisional Court was whether the Court of Quarter Sessions were right in allowing the appeal.

When the special case came before the Divisional Court an order was made remitting the case to the Quarter Sessions for statement of the matters which the Corporation had taken into account and which were outside s. 62 and which, in the view of the justices, the Corporation were not entitled to consider. In compliance with this order the Quarter Sessions stated that those matters were (1.) That the Town Planning and By-laws Sub-Committee of the respondent Corporation had taken into consideration matters in regard to the safety of the public and the convenience of pedestrians and vehicular traffic which might use Chad Street; and (2.) that the Sub-Committee had regard to certain powers which they hoped to obtain under their proposed Town Planning Scheme whereby the portion of the Borough including

Chad Street would be zoned for residential purposes only. The justices further stated that views were expressed as to the desirability of the crossing, but that they came to no decision on that point, being of opinion that in law the owners of land abutting on a highway have an absolute right of access to the highway and that this right was not taken away by the Blackpool Improvement Act, 1879.

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The Divisional Court dismissed the appeal of the Corporation and confirmed the decision of Quarter Sessions. (1) The Corporation appealed to the Court of Appeal, and that Court (Scrutton and Slesser L.JJ., Eve J. dissenting) allowed the appeal (2) and remitted the matter to the Corporation, directing them at the same time that they could not exclude the applicants from all access to their premises, but that they were entitled to consider the nature of the access and the safety of the public in determining what access should be allowed.

The applicants appealed to this House.

1934. May 14. *Wilfrid Greene K.C., Eastham K.C. and T. E. Hinchcliffe* for the appellants. The owner of land adjoining a highway is entitled to access to the highway at all points where his land adjoins it: *St. Mary, Newington (Vestry) v. Jacobs* (3); *Ramuz v. Southend Local Board* (4); *Tottenham Urban District Council v. Rowley*. (5) The rights of the public to pass and repass along the highway are subject to this right of the adjoining owner. The decision of the Court of Appeal would make the owner's right subject to the convenience of the public. It may be conceded that if the actual method of access, a paved crossing for example, caused an obstruction to the footway or was at a dangerous incline to the carriageway, the respondents might interfere and exert the power of refusing to sanction the proposed approach under s. 62 of the Blackpool Improvement Act, 1879. But they do not complain of the proposed method of access.

(1) [1933] 1 K. B. 688.

(4) (1892) 67 L. T. 169.

(2) [1933] 2 K. B. 339.

(5) [1912] 2 Ch. 633; [1914]

(3) (1871) L. R. 7 Q. B. 47. A. C. 95.

H. L. (E.) [Attorney-General v. Horner (1) ; Goldsmid v. Great Eastern
 1934 Ry. Co. (2) and Great Eastern Ry. Co. v. Goldsmid (3) were
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 CORPORATION, take into consideration powers which they hoped to acquire
 ——— under a future town planning scheme. It is not intended to
 challenge that decision. But as to means of access to the
 highways in their district they claim the right and the duty
 to control and supervise these and refuse to sanction them
 if they are likely to be a danger to foot passengers or an
 obstruction to traffic. The streets are vested in and placed
 “ under the control of ” the respondents as the urban authority
 under s. 149 of the Public Health Act, 1875. It is submitted
 that those words confer on the respondents some power of
 directing where a proposed crossing of a public footway shall
 be situated. If next door to the appellants’ sheds there were
 a school for young children, it would be reasonably within
 the powers of the respondents to refuse their sanction to
 any crossing of the footway from that part of appellants’
 premises which adjoined the site of the school. Or if the
 appellants proposed to open access to the highway at a point
 where traffic was usually congested, the respondents may
 reasonably refuse to sanction an approach at that point.

Counsel was not called upon in reply.

The House took time for consideration.

June 25. LORD ATKIN. My Lords, the question in this
 case arises on a case stated by the Court of Quarter Sessions
 for the County of Lancaster on an appeal by the appellants
 from the refusal of the Corporation of Blackpool to sanction
 works forming a communication from the appellants’ premises
 across a footpath in St. Chad’s Road, Blackpool. The
 appellants are motor coach proprietors and are the owners of
 premises No. 1 St. Chad’s Road. St. Chad’s Road is a road
 running into the Blackpool Promenade. The premises No. 1

(1) (1884) 14 Q. B. D. 245, 256, (2) (1883) 25 Ch. D. 511.

257.

(3) (1884) 9 App. Cas. 927.

have a narrow frontage to the Promenade and a long frontage to St. Chad's Road. They abut on the road, the footway about 8 feet wide intervening between the premises and the roadway, which is about 20 feet wide. As the appellants wished to have access from their premises to the roadway in St. Chad's Road, and for that purpose their vehicles would have to cross the footpath, they had to comply with the provisions of s. 62 of the Blackpool Improvement Act, 1879. That section is as follows: [His Lordship read the section, and proceeded.] A plan of the proposed communication was duly submitted to the Corporation containing the statutory particulars. The Corporation refused to sanction the execution of the works. No objection was taken to the works as such, but, as found by Quarter Sessions, the Corporation took into consideration matters in regard to the safety of the public and convenience of pedestrians and vehicular traffic which might use Chad Street, and also had regard to certain powers which they hoped to obtain under their proposed town planning scheme whereby this portion of the Borough would be zoned for residential purposes only. The Court of Quarter Sessions, to whom by s. 111 of the Act an appeal lay from the refusal of the Corporation, came to the conclusion that the Corporation was not entitled to take into consideration the foregoing matters, and subject to a case stated allowed the appeal. The Divisional Court, consisting of the Lord Chief Justice and Avory and Branson JJ., affirmed the decision of Quarter Sessions. The Court of Appeal by a majority (Scrutton and Slesser L.JJ., Eve J. dissenting) allowed the appeal. They agreed that the zoning question could not be considered but thought that the first question could, and remitted the matter to the Corporation for decision upon that footing.

My Lords, in order to construe the section it seems desirable to consider what the rights of the appellants would be if no such enactment were in existence. The law appears to me to be as stated by the Lord Chief Justice, who has cited the relevant authorities. With no hope of improving that statement, but as a foundation for my own opinion, I propose to

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say shortly what I conceive the legal position to be. The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access: just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. Apart from any statutory provision there is no obligation upon an adjoining owner to fence his property from the highway: and though in urban districts fencing is usual, your Lordships will be familiar with many instances to the contrary, as for instance in country towns, where it is common to find large open forecourts to country inns and the like where market carts and farm vehicles are left during business hours. Moreover the ordinary traffic on any highway is always liable to be increased by the exercise by an adjoining owner of this right of access. A building estate may be developed, or a theatre, concert hall, cinema, or hotel erected on premises which will necessarily involve incalculable increase of traffic. Subject to special statutory provisions protecting footpaths, the right of access is not affected by the fact that part of the highway is only dedicated as a footway, or is otherwise lawfully appropriated to foot passengers. The passage of the public along a footway is always liable to be temporarily interrupted by adjoining owners' right of access, whether to the footway or the roadway: and the dangers, if dangers there be, of a pedestrian having his path crossed by vehicles exercising right of access may be increased, and lawfully increased, by the adjoining owner or owners increasing their means of access.

As was pointed out by the Lord Chief Justice, it would be remarkable to find this well established right of an adjoining owner taken away and without compensation, especially in a local Act, unless there were very plain words to that effect. As far as I can see the section does not even purport to affect

the right at all. It is directed to works and to works only. The place of the communication must be stated: not to enable the Corporation to reject the place apart from the nature of the works, but to fix it on the plan and enable the Corporation to judge what provision is made for kerbing and for a paved crossing, and to consider the dimensions and gradients of the necessary works. Plainly the Corporation may consider the nature of the proposed user in order to judge how the way should be constructed, both as to surface and kerbing and in relation to the gradient. If the actual works, either by the steepness of the gradient or the depth of the side kerbing, would be likely to affect the safety of pedestrians on the footway or of vehicles on the roadway, there seems to me no reason why they should not take those factors into account. But in my opinion they are not entitled to take into account questions of safety and convenience of the public except in so far as affected by the nature of the works. They may not therefore take into account the nature and extent of the proposed user of a communication in itself safe and sufficient for that user. That user is, as has been pointed out, controlled by the general highway law. It follows that however large the existing traffic in St. Chad's Road may be both of vehicles and pedestrians, the corporation may not restrict the addition of further traffic to it, even for the promotion of the convenience or safety of the public, by using the powers of s. 62 so as to refuse sanction to works which in themselves are safe and adequate. That there is no objection to the works as works is stated in the agreed case; and I feel no doubt that the order of Quarter Sessions operates to give the sanction which was withheld by the Corporation, a power which the unrestricted terms of s. III undoubtedly confers upon Quarter Sessions. For these reasons I am of opinion that the order of the Court of Appeal should be set aside and the order of the King's Bench Division should be restored. The appellants should have the costs here and in the Court of Appeal.

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LORD WARRINGTON OF CLYFFE. My Lords, I concur.

H. L. (E.) LORD THANKERTON. My Lords, I agree.

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Order of the Court of Appeal reversed: Order of the King's Bench Division of the High Court of Justice, thereby set aside, restored: Respondents to pay to the Appellant the costs incurred in the Courts below and also the costs of the Appeal to this House: Cause remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Order.

Lords' Journals, June 25, 1934.

Solicitors for appellants: *Johnson, Peacock, Hepworth & Chowne, for James E. Harrison, Blackpool,*

Solicitors for respondents: *Sharpe, Pritchard & Co., for D. L. Harbottle, Town Clerk, Blackpool.*

[HOUSE OF LORDS.]

H. L.
(N. Ir.)*

McEVoy APPELLANT;

AND

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THE BELFAST BANKING COMPANY, }
LIMITED } RESPONDENTS.

Banker and Customer—Deposit Account—Deposit Receipt in Names of father and infant son—Will of father—Son residuary legatee—Deposit money transferred by Bank to Account of executors—Claim of son against Bank—Ratification—Acquiescence.

J. M., being in failing health and expecting death in a short time, deposited a sum of 10,000*l.* with the B. Bank and received from the Bank a deposit receipt in this form: "10,000*l.* Received from J. M. and J. D. M. (a minor)," the son of J. M., ... "the sum of ten thousand pounds sterling for credit in deposit account. Not transferable. . . . Payable to either or the survivor. . . . This receipt must be produced when payment of either principal or interest is desired."

* *Present*: LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD MACMILLAN.

By his will, after giving certain legacies, J. M. directed his executors to hold the rest of his property in trust for J. D. M. until he should attain the age of 25 years and, on his attaining that age, for him absolutely. Until J. D. M. attained that age the business of the testator was to be carried on by the executors. There were other dispositions in case J. D. M. died under that age, an event which did not happen.

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On the death of J. M. the executors withdrew and redeposited the sum of 10,000*l.* and obtained a new deposit receipt for that sum in their own names. The business of the testator was carried on at a loss. The business account kept by the executors with the B. Bank was continually overdrawn. The executors repeatedly paid the overdrafts out of the 10,000*l.* and in so doing finally exhausted the whole sum. Both before and after he came of age J. D. M. took part in the management of the business.

Soon after attaining the age of 25 J. D. M. claimed that he was entitled to the 10,000*l.* deposited by J. M., and brought an action against the B. Bank to recover that sum as having been wrongfully and without his authority paid by the Bank to the executors:—

Held, by Lord Warrington and Lord Macmillan, that the executors were entitled to receive the money and to apply it in due course of administration as directed by the will of J. M.; Lord Thankerton agreeing on the ground that on the evidence as a whole J. M. did not purport to act as agent for J. D. M. in making the contract with the Bank, so as to make J. D. M. a contracting party, but that he alone contracted with the Bank, though for the benefit of J. D. M. as a third party.

Held, by Lord Atkin, that the contract was made by J. M. on behalf of himself and J. D. M., and that if J. D. M. had ratified the act done on his behalf he would have made himself a party to the contract; but that by his conduct he had represented to the Bank that he did not intend to ratify the act done on his behalf, that having so acted he could not afterwards ratify it, and that consequently he had never become a party to the contract.

Order of the Court of Appeal in Northern Ireland affirmed.

APPEAL from an order of the Court of Appeal in Northern Ireland affirming an order Megaw J. in the Chancery Division of the High Court of Justice in Northern Ireland made in an action in which the appellant was plaintiff and the respondents were defendants.

The appellant, J. D. L. McEvoy, was the only son of John McEvoy, who carried on the business of a family grocer, wine and spirit merchant, and undertaker at 56, Merchant Quay, Newry, in the County of Down. The appellant was born on November 14, 1905.

H. L. (N. Ir.) The respondents were and are a banking company having
 1934 a branch bank at Newry, of which the manager was at all
 McEvoy material times one William H. Coleman.

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 ———

On July 20, 1921, John McEvoy, who was in bad health and anticipating his early death, being entitled to a sum of 10,000*l.* on a deposit account with the respondents, withdrew that sum and redeposited it, receiving from the respondents a deposit receipt in the following form :—

“ Deposit Receipt. No. 65564. Belfast Banking Company Limited.

“ £10,000. Newry, 20th July, 1921. Received from John McEvoy, Esq., and Mr. Joseph D. McEvoy (a minor), Newry, the sum of ten thousand pounds sterling for credit in Deposit Account. Not transferable. For the Belfast Banking Company Limited. W. H. Coleman, Manager.”

[Inserted here by means of a rubber stamp were the words “ Payable to either or the survivor.” The form continued :—]

“ Entered M. McKinley, Accountant.

. . . . This receipt must be produced when payment of either principal or interest is desired.”

The deposit receipt bore certain indorsements which recorded subsequent transactions related below.

On August 10, 1921, John McEvoy made and executed his will. On September 20, 1921, he died. On October 22, 1921, an envelope was left by the executors of the will with the respondents' manager, Mr. Coleman. On December 16, 1921, John McEvoy's will was proved by James Adamson, Patrick McEvoy, James Kinney and Edward Kinney, the executors named therein. By his will, after making certain pecuniary bequests the testator directed all the rest of his property to be held in trust for the appellant until he reached the age of 25 years and, on his attaining that age, for him absolutely. Until the appellant attained that age the testator authorized his business to be carried on by his sister-in-law, Alice Kinney, on such terms as his executors in their absolute discretion might arrange. The affidavit leading to probate made no mention of a deposit receipt for 10,000*l.*

On January 25, 1922, the envelope left by the executors

with the respondents was opened and was found to contain H. L. (N. Ir.) the deposit receipt, No. 65564, for 10,000*l.* mentioned above. The executors indorsed this deposit receipt and received 10,000*l.* with 170*l.* interest thereon. They redeposited the sum of 10,000*l.* ; a new deposit receipt for 10,000*l.* in the names of the executors was made out by the manager's duly authorized agent acknowledging that the bank had " Received from Messrs. James Adamson, Patrick McEvoy, James Kinney and Edward Kinney the sum of 10,000*l.* sterling for credit in deposit account. Not transferable. Payable to them, the survivors, or the survivor." This deposit receipt was not handed to the executors but was kept by the respondents. The 170*l.* was paid by the executors into a current account kept by them for the purposes of the administration of the testator's estate and hereinafter called the business account.

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In the summer of 1923 the appellant, being then 17 years old, returned from school and began to take part in the business carried on by the executors, who were purporting to act under the will of John McEvoy.

On November 30, 1923, a sum of 334*l.* 2*s.* 3*d.* had accrued due as interest on the sum of 10,000*l.* A new deposit receipt for 10,334*l.* 2*s.* 3*d.* was issued by the respondents in the names of the executors and was retained by the respondents.

On February 27, 1925, a sum of 257*l.* 12*s.* 10*d.* had accrued due as interest on the sum of 10,334*l.* 2*s.* 3*d.* The sum of 257*l.* 12*s.* 10*d.* was transferred by the executors to the credit of the business account, and was applied by them in reduction of their overdraft upon that account. A new deposit receipt for 10,334*l.* 2*s.* 3*d.* was issued in the names of the executors and retained by the respondents.

Early in 1925 Alice Kinney ceased to manage the business. One William Murden was appointed by the executors as manager. At that time the business account was overdrawn to the amount of 2738*l.* 17*s.* 8*d.*

Shortly before May 1, 1925, the executors had agreed to purchase a certain property known as Rooney's Terrace, in the town of Newry. At this time the appellant was assuming more and more control of the business, and in the matter of

H. L. (N. Ir.) acquiring this property he took a very active part. On May 1, 1925, a further sum of 51*l.* 16*s.* 2*d.* had accrued as interest on the principal sum of 10,334*l.* 2*s.* 3*d.* The executors withdrew from the deposit account 2076*l.*, with which they paid the purchase money for the property in Rooney's Terrace. A new deposit receipt for 8309*l.* 18*s.* 5*d.* was issued in the names of the executors, and retained by the respondents.

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On November 14, 1926, the appellant came of age. The overdraft on the business account then amounted to 4027*l.* 10*s.* 3*d.*

On January 7, 1927, a sum of 399*l.* 19*s.* 4*d.* had accrued due as interest on the principal sum of 8309*l.* 18*s.* 5*d.* The executors transferred 1709*l.* 17*s.* 9*d.* from the deposit account to the business account and applied it in reducing the overdraft. A new deposit receipt for 7000*l.* was made out in the names of the executors and retained by the respondents.

In the Spring of 1927, William Murden was dismissed from the position of manager of the business and until February 1, 1928, the appellant himself acted as manager.

On October 10, 1927, a sum of 142*l.* 6*s.* had accrued due as interest on the principal sum of 7000*l.* The executors transferred 3142*l.* 6*s.* from the amount on deposit to the credit of the business account, and applied it in paying off the overdraft on that account and leaving the account in credit approximately to the amount of 500*l.* A new deposit receipt for 4000*l.* was issued in the names of the executors and was retained by the respondents.

On February 1, 1928, one John McParland was appointed nominally as manager of the business in the place of William Murden, but as to his actual position the evidence was conflicting. To a large extent the appellant acted as manager, and after July, 1929, when McParland was dismissed, there was no manager other than the appellant.

On October 2, 1928, a sum of 98*l.* 1*s.* 8*d.* had accrued as interest on the principal sum of 4000*l.* The executors transferred 3098*l.* 1*s.* 8*d.* to the credit of the business account and applied it in paying off the overdraft on that account and leaving the account in credit to the amount of 319*l.* 13*s.* 4*d.*

A new deposit receipt for 1000*l.* was issued to the executors H. L. (N. Ir.) and retained by the respondents.

On July 19, 1929, a sum of 24*l.* 6*s.* had accrued as interest on the principal sum of 1000*l.* The entire sum of 1024*l.* 6*s.* was transferred by the executors to the credit of the business account and applied by them in paying off the overdraft on the account and leaving the account in credit to the amount of 229*l.* 5*s.* 7*d.*

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On November 14, 1930, the appellant attained the age of 25 years.

On April 27, 1931, the appellant brought the action against the respondents claiming (a) a declaration that he was entitled to the moneys represented by the deposit receipt dated July 20, 1921 ; (b) an account of the interest due thereon, and (c) payment of the sum of 10,000*l.* and interest.

The respondents by their defence (a) denied that the appellant was ever entitled to the deposit receipt or the moneys represented thereby. They pleaded :—

(b) that the business of John McEvoy had been carried on by the executors and trustees of his will until the appellant had reached the age of 25 years as directed by the will, and that the sum of 10,000*l.* was duly placed on deposit at the respondents' branch bank in the names of the executors on January 25, 1922 ;

(c) that two sums of 170*l.* and 257*l.* 12*s.* 10*d.* representing interest on the deposit were withdrawn by the executors on January 25, 1922, and February 27, 1925, with the appellant's consent and approval and were paid and applied by the executors and trustees to the use of the appellant and had enured to the appellant's benefit ;

(d) that on May 1, 1925, the executors and trustees at the request and with the approval of the appellant withdrew from the deposit the sum of 2076*l.* and expended that sum in purchasing in the name and on behalf of the appellant certain house property in Newry known as Rooney's Terrace, and that the appellant, after attaining the age of twenty-one years ratified the purchase and accepted and remained in possession and enjoyment of the property ;

H. L. (N. Ir.) (e) that sums amounting to 8309*l.* 18*s.* 5*d.*, the balance of the money on deposit, together with all interest thereon, had since been withdrawn by the executors and trustees at the request and with the authority and approval of the appellant on the several dates and in the several sums above mentioned ;

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(f) that the sums withdrawn as above mentioned were at the request and at the direction of the appellant transferred to a current account in connection with the business which the appellant was then managing, and had come to the hands of the appellant or been applied by his direction.

(g) They paid 594*l.* 11*s.* 2*d.* into Court with a denial of liability.

The appellant in his reply pleaded that the 10,000*l.* did not form any part of the assets of John McEvoy passing to his executors, and that they had no authority to employ any part of that sum in carrying on his business ; and that the transfers from the deposit account to the business account were made to pay off the indebtedness of the executors themselves to the respondents in regard to which the appellant had never incurred any liability.

The action was tried by Megaw J. in the Chancery Division. In his written judgment the learned judge expressed the opinion that the appellant was “ a young man of great ability and intelligence in business matters,” and that he was well aware, if not before his father’s death, at any rate very soon afterwards, that his name was upon the deposit receipt and had been added for some purpose of avoiding death duties, and that the executors had procured the transfer of the sum to their names. He held that the proved intention of the testator was sufficient to rebut any presumption of advancement in favour of the appellant, and that in ordinary circumstances a court of equity would declare a resulting trust in favour of the testator’s estate, but that, in view of the questionable transaction in which he and the executors were concerned, equity could not be invoked in favour of the estate ; that the appellant was therefore entitled in law to the 10,000*l.* ; that the respondents could have no higher rights

than the executors, and found themselves at John McEvoy's death by their own contract debtors not to the executors but to the appellant. Upon the question of the appellant's acquiescence in and ratification of the acts of the executors the learned judge found that from the time when he came of age the appellant had practical control of the business ; and after reviewing the evidence came to the conclusion that the payments made to the business account out of moneys to which the appellant was entitled were made at his instigation and with his full consent and authority when he was a free and informed agent ; that no reliance was to be placed on the appellant's statement that it was only in November, 1930, that he became aware of his rights ; that the purchase of the property in Rooney's Terrace, and the transfers to the business account made on January 7, 1927, October 10, 1927, October 2, 1928, and July 19, 1929, were made with the appellant's full consent, acquiescence and authority. So far as these payments were concerned the respondents were entitled to succeed.

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With regard to the sums of 170*l.* and 257*l.* 12*s.* 10*d.*, transferred to the business account before the appellant had come of age, the learned judge held that there was no such active ratification of these withdrawals as would prevent the appellant from recovering these sums with interest ; the two sums with interest amounted to 514*l.* 4*s.* 4*d.* ; but as the respondents had paid into Court 594*l.* 11*s.* 2*d.*, the action was dismissed with costs.

On appeal to the Court of Appeal in Northern Ireland, the Court (Sir William Moore L.C.J. and Andrews L.J., Best L.J. dissenting) affirmed the judgment of Megaw J. and dismissed the appeal.

Hence the appeal to this House.

1934. April 30. *J. M. Whitaker* of the English Bar and K.C. of the Irish Bar and *Sir Henry Wynne* of the Irish Bar for the appellant.

If the 10,000*l.* deposited with the respondents on July 20, 1921, formed part of the estate of John McEvoy at his death, and if his executors applied it in carrying

H. L. (N. Ir.) on his business in accordance with the directions in his will, their conduct cannot be called in question, and neither can that of the respondents for honouring the executors' drafts on the fund ; but if the 10,000*l.* did not form part of John McEvoy's estate, then the executors, and consequently the respondents, had no right to apply any part of it to the purposes of the business, in other words to the purposes of the executors themselves. The respondents plead that the executors acted with the authority and at the request of the appellant. But an approval, by a beneficiary of acts done by his trustees while he was an infant, to be worth anything must be made with full knowledge of what is being approved : *Walker v. Symonds*. (1) He may approve of payments made by his trustee when he knows that the payments are being, or have been, made out of the trust fund ; but to speak of his approving of payments made out of his own money, when he believes that they are being made out of the trust fund, is to take the approval of one act as and for the approval of another. There is no evidence that the appellant until November, 1930, when he consulted his present advisers, had any suspicion that the 10,000*l.* was not part of his father's estate, and no evidence that he ever authorized the executors to apply his own money in administering his father's estate. Therefore any request or authority to the executors to deal with the 10,000*l.* is out of the case unless the 10,000*l.* was part of John McEvoy's estate. Whether it was or not is the crucial question in the case, for the respondents can only justify payments made out of the 10,000*l.* by the lawful authority of the executors.

Both the Courts below have held that, as between the appellant and the respondents, the appellant was the legal owner of the 10,000*l.* In the opinion of the learned judges the presumption of advancement, which would have given the appellant an equitable interest, would in ordinary circumstances be rebutted through the contrary intention of John McEvoy to be inferred from the facts that he did not take the deposit receipt in the sole name of the appellant and that

(1) (1818) 3 Swanst. 1, 68, 69.

he retained it or deposited it with the respondents. But, *H. L. (N. Ir.)* the learned judges hold, on the principle of *Childers v. Childers* (1) and *Gascoigne v. Gascoigne* (2), these facts cannot be relied on to rebut the presumption of advancement and impose a resulting trust in favour of John McEvoy's estate, because they were done or omitted with the unlawful intention of avoiding the payment of death duties; and so equity retires from the scene and leaves the law in possession.

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But the appellant puts his case higher than that of the legal owner merely. All agree that the father's desire was to benefit his son. There is nothing illegal in disposing of one's property so that it shall escape taxation. If in this case the attempt was successful, who but the appellant was intended to benefit by the success? That John McEvoy intended to take the 10,000*l.* out of his estate is clear. If it had remained as it was in his sole name it must have formed part of his estate; why was the original deposit receipt cancelled, and the money deposited in the joint names of the father and son, except in order that it should no longer be part of the father's estate, but that he and his son should be jointly entitled to it? If during the lifetime of John McEvoy the appellant had presented the deposit receipt and had demanded payment of the 10,000*l.* upon no pretext could the respondents have refused payment in view of the words defining the terms of their contract and declaring that the money had been "received from John McEvoy, Esq., and Mr. Joseph D. McEvoy" and was "payable to either or the survivor." The result is that the 10,000*l.* did not form part of John McEvoy's estate, but belonged both in law and in equity to the appellant. In these circumstances the respondents cannot justify applying the money at the request of the executors in reducing the executors' overdrafts on the business account and so repaying themselves the debts due to them from the executors. The only right of the respondents was to be recouped out of the estate of John McEvoy, which did not include the 10,000*l.* or any part thereof.

Wilfrid Greene K.C. and *J. C. MacDermott* (of the Irish

(1) (1857) 3 K. & J. 310.

(2) [1918] 1 K. B. 223.

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H. L. (N. Ir.) Bar) for the respondents. The sum of 10,000*l.* or, the obligation of the respondents in relation to it, the chose in action, never ceased to be part of the estate of John McEvoy. It could only be assigned by way of a present gift, or by will : *Foundling Hospital (Governors and Guardians) v. Crane*. (1) There was no attempt to pass it by will to the appellant. There was an attempt to pass it to him by gift. If the gift had been completed by delivery of the deposit receipt to him there might have been a good donatio mortis causa : *In re Dillon* (2) ; but the gift was never completed. The appellant being a mere volunteer a Court of Equity will not help him : *Edwards v. Jones* (3) ; *Milroy v. Lord* (4) ; *Richards v. Delbridge* (5) ; *Moore v. Ulster Bank* (6) ; *In re Williams*. (7) A gift of personal property otherwise than by deed or will cannot be made without present delivery, actual or symbolic ; actual if the property consists of chattels in possession ; symbolic if it consists of choses in action : *Cochrane v. Moore*. (8)

There might have been a valid gift of the 10,000*l.* if the deposit receipt had been handed to the appellant : *In re Dillon* (2) ; *In re Westerton*. (9) It never was so handed. John McEvoy kept it in his own possession and never intended that it should come into the appellant's possession while he, his father, was alive. The result is that the executors were entitled to the deposit receipt as part of the estate of John McEvoy : *In re Richardson* (10) ; *O'Flaherty v. Browne* (11) ; *In re Engelbachs' Estate* (12) ; *Owens v. Greene*. (13)

If the appellant bases his claim upon a contract with the respondents, the answer is that the contract, if any, was with John McEvoy and not with the appellant. The appellant was never a contracting party. He gave no consideration for the contract, and was a mere volunteer. The respondents were debtors to John McEvoy, but never to the appellant. If

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| (1) [1911] 2 K. B. 367. | (7) [1917] 1 Ch. 1. |
| (2) (1890) 44 Ch. D. 76. | (8) (1890) 25 Q. B. D. 57. |
| (3) (1836) 1 My. & Cr. 226, 236 et seq. | (9) [1919] 2 Ch. 104. |
| (4) (1862) 4 D. F. & J. 264. | (10) (1885) 30 Ch. D. 396. |
| (5) (1874) L. R. 18 Eq. 11. | (11) [1907] 2 I. R. 416. |
| (6) (1877) I. R. 11 C. L. 512. | (12) [1924] 2 Ch. 348. |
| | (13) [1932] I. R. 225. |

A for good consideration promises B that he will pay X a H. L. (N. Ir.) sum of money, X has no right of action against A. In order to give X any such right there must be an attornment by B to X; or some engagement entered into between them: *Williams v. Everett* (1) or at least notice by B to X: *Rekstin v. Sibirsko, &c., Co.* (2) English law knows nothing of a *jus quaesitum tertio*. There never was any such attornment by the respondents or any engagement by them with the appellant to assume towards him the obligations of bankers or notice to him that they had done so. Failing such an attornment, engagement or notice, John McEvoy might at any time have withdrawn his mandate to the respondents to pay the money to the appellant.

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The evidence is overwhelming, and the fact is not disputed, that the appellant assented to the 10,000*l.* being applied in reduction of overdrafts upon the business account. No doubt the executors were responsible to the respondents for these overdrafts, but they in turn were entitled to indemnity out of John McEvoy's estate. The overdrafts were largely due to the appellant's intemperate and thriftless habits, and the executors should in any event be relieved to the extent to which the value estate was impaired through the appellant's extravagance. Moreover in so far as the money drawn from the deposit was applied to the appellant's maintenance or that of his wife, or to his own use, it certainly cannot be recovered by him.

Finally the conduct of the appellant after he came of age affords ample evidence of ratification of acts done by the respondents while he was under age.

May 8. *J. M. Whitaker* in reply. The appellant is not concerned to dispute the first point raised by the respondents. He does not rely upon any transfer to him of the 10,000*l.* That sum had already become the property of the respondents on July 20, 1921, when John McEvoy paid it to them and thereby purchased the contract expressed in the deposit receipt of that date. Therefore it matters not to the appellant whether the so called assignment was one which Equity would favour. He has never asked for the assistance of a court

(1) (1811) 14 East, 582, 597.

(2) [1933] 1 K. B. 47.

H. L. (N. Ir.) of equity in the matter. He founds his case upon the contract of July 20, 1921, between the respondents of the one part and John McEvoy (since deceased) and himself of the other part, whereby the respondents agreed to pay the sum of 10,000*l.* to John McEvoy and the appellant or either of them or the survivor. They did not pay John McEvoy in his lifetime, neither did they pay the appellant in the lifetime of John McEvoy, nor did they pay the appellant as the survivor of John McEvoy. In breach of their contract they paid the executors of John McEvoy.

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It is said that the appellant was a mere volunteer and that there was no consideration moving from him, and that therefore he cannot sue upon it. That is not law. The fact that no consideration moves from one of the promisees is immaterial. One person may make a contract on behalf of another although no consideration moves from the latter. It is sufficient if good consideration moves from the former. Then if the latter ratifies the act done on his behalf he can sue on the contract: *Hills v. Mesnard* (1); *Belshaw v. Bush* (2); *Simpson v. Eggington*. (3) The fact of bringing this action is sufficient evidence of ratification. The respondents, who have always kept the deposit receipt in their own possession, can make no point that its production was a condition precedent to the appellant's right of action. By their conduct they have waived any condition precedent: *Mackay v. Dick*. (4)

[*Gason v. Rich* (5); *In re Condrin* (6) and *M'Dowell v. M'Neilly* (7) were also referred to.]

The House took time for consideration.

June 28. LORD ATKIN. My Lords, the appeal in this case arises on questions arising out of the remarkable transactions affecting a deposit receipt issued by the respondent bank. The facts are fully stated in the judgments of the Courts of Northern Ireland, and I only restate so much of them as appears necessary for my opinion.

(1) (1847) 10 Q. B. 266.

(2) (1851) 11 C. B. 191, 206.

(3) (1855) 10 Ex. 845.

(4) (1881) 6 App. Cas. 251.

(5) (1887) 19 L. R. Ir. 391.

(6) [1914] 1 I. R. 89.

(7) [1917] 1 I. R. 117.

In 1921 John McEvoy, a widower, aged over 60, owned H. L. (N. Ir.) premises in Newry, where he carried on successfully the business of a publican, a grocer and an undertaker. He had an only son, the appellant, Joseph, then a boy of 15. He was a customer of the bank, and for some years had a deposit account with the bank for which he held from time to time the appropriate deposit receipt. In July, 1921, he held a deposit receipt for 10,000*l.* In that month he found himself to be mortally ill. On July 19, he summoned the bank manager at Newry, Mr. Coleman, to his house, where there were also present his brother-in-law and Mr. Adamson. He discussed his affairs and announced that he was proposing to leave everything to his son tied up until his son was 25 and that Miss Kinney, his sister-in-law, would manage the business. The question then arose as to death duties. He wished to avoid paying duty on the 10,000*l.* deposit receipt and asked whether if there could be two names would it meet the case. Mr. Coleman was not prepared to advise him. He then gave directions that the deposit receipt should be put in the names of himself and his son, payable to either or the survivor; and it was arranged that the existing deposit receipt should be sent over to the bank next day for that purpose. Accordingly the next day the brother-in-law brought the deposit receipt endorsed by John McEvoy. The accrued interest was paid partly in cash and partly by a transfer to current account, and in respect of the principal a new deposit receipt was issued, the form of which is apparently usual in Northern Ireland and is as follows:—

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“ Belfast Banking Co.,

“ Newry,

“ 20th July, 1921.

“ £10,000.

“ Received from John McEvoy, Esq., and Mr. Joseph
“ D. McEvoy (a minor), Newry, the sum of ten thousand
“ pounds sterling for credit in deposit account, not trans-
“ ferable.

“ For the Belfast Banking Co., Ltd.,

“ W. H. Coleman (Manager).

H. L. (N. Ir.)

“ Payable to either or the survivor.

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“ This receipt must be produced when payment of either
“ principal or interest is desired.”There are terms of the notice and interest endorsed on the
back, which for present purposes are irrelevant.On the same date the Bank opened a separate deposit
account in their books in the names of “ John McEvoy and
Jos. D. McEvoy (a minor)”.

On August 10, 1921, John McEvoy made his will. He appointed four executors and trustees, and after giving certain legacies disposed of the residue as follows: “ All the rest of my property is to be held in trust for my son, Joseph D. L. McEvoy, until he attains the age of twenty-five years, and on his attaining said age for him absolutely, and pending his attaining said age I authorize my said business to be carried on by my sister-in-law, Alice Kinney, on such terms as my executors in their absolute discretion may arrange.” In case his son died under the age of twenty-five, he made further dispositions.

On September 13, 1921, he deposited with the bank a further 2000*l.*, taking a deposit receipt in his own name, the amount being entered by the bank in the deposit account kept from 1907 in the name of John McEvoy.

On September 20, 1921, John McEvoy died. The solicitor for the executors, Mr. Gartlan, very properly insisted that the moneys on deposit should be disclosed in the Schedule of assets to be sworn by the executors. The executors refused, and, as Mr. Gartlan persisted, they employed another firm of solicitors, and omitted from the Schedule any reference to the capital sums, though there appears under “ Cash at Bankers on deposit and interest thereon ” 66*l.* 2*s.* 3*d.* On December 16, 1921, probate was granted to the four executors and noted by the bank on December 20, recording “ Value 2458*l.* 7*s.* 9*d.*” On January 25, 1922, the four executors endorsed both the deposit receipts; and in respect of the 10,000*l.* receipt directed 170*l.*, the accrued interest, to be transferred to their current account; and as to the principal sum of 10,000*l.* opened a deposit account and obtained a new deposit receipt in their own names.

The deposit receipt of July 20, which, it will be remembered, H. L. (N. Ir.) was payable to John McEvoy or Joseph McEvoy or the survivor, was marked back and front by the bank "Paid 25th January, 1922," "Redeposited £10,000." According to the son, he saw Coleman twice in the year 1922 and asked him why the deposit receipt was changed into the names of the trustees and received on the first occasion the answer that it would save compound interest if so changed, and on the second occasion that it was changed under the will and belonged to trustees till he was twenty-five. Mr. Coleman denied both conversations. What the learned judge's finding was on this conflict is not clear, but he finds that the plaintiff was aware, if not before his father's death, at any rate very soon after, that his name was on the deposit receipt, that the change was made for a purpose connected with avoiding death duties, and that the executors had had the sum transferred to their names. After his father's death the son returned to school, but left in 1923, and thereafter took a part in the business, which became more prominent as time went on. It has to be remembered that under the terms of the will the business was being carried on by the executors until the son attained the age of 25, which he did on November 14, 1930. He came of age on November 14, 1926. Until Easter, 1925, the business was being managed by the testator's sister-in-law, Miss Kinney. She left at that time and was succeeded by one Murden, who managed until May, 1927. From February, 1928, to July, 1929, the business was managed by one McParland.

In the interval the son appears to have been the only manager, and he assumed control on McParland's departure. He appears during most of the time to have kept the books and it would appear that as the prospective owner of the business he was allowed by the executors considerable latitude. Whatever the cause may be the business soon ceased to prosper. When Miss Kinney left there was an overdraft of over 2700*l.*, which by November, 1926, had grown to 4000*l.* In May, 1925, the executors had purchased a property known as Rooney's Terrace in Newry and drew a sum of 2000*l.*

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H. L. (N. Ir.) from the deposit account, lodging the existing deposit receipt, and taking a new one for the reduced sum. This transaction took place with the knowledge of the son, not then of age, and with his approval.

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It is obvious that after 1926 the bank were dissatisfied with the overdraft and were pressing the executors to reduce it. In January, 1927, they drew 1000*l.* from the deposit account, in October, 1927, 3000*l.*, in October, 1928, another 3000*l.* and in July, 1929, the balance of 1000*l.* On that date the whole of the 10,000*l.* had been spent, 8000*l.* of it in repaying to the bank liabilities which had been incurred to the bank by the executors in carrying on the business. It is plain that the son was aware of these drawings from the deposit account and the purpose for which they were required, and took a part in procuring the necessary signatures from the executors and lodging them with the bank.

In 1930 the son, through his solicitors, claimed from the bank the sum of 10,000*l.* under the original deposit receipt, to which the answer was that he had known and approved throughout the manner in which the money had been dealt with. In April, 1931, the writ in the action was issued. The defence in substance raises two issues : (1.) That the plaintiff was never entitled to the 10,000*l.* ; (2.) that if he was, the bank had paid the money at his request and at his direction.

As to the first point, all the judges in Northern Ireland have decided against the bank. Megaw J. was of opinion that the ordinary presumption of advancement would be negatived by the circumstances of the opening of the deposit account if it were not that the object of all the parties, including the testator, was to defraud the revenue of estate duty. Holding that the bank and the executors could not set up an unlawful purpose to negative the presumption of advancement he concluded that the Court must leave the ownership in the condition in which it was as between the plaintiff and the estate at the death of John McEvoy. The bank found themselves at John McEvoy's death by their own contract the debtors not to the trustees but to the plaintiff. Both the Lord Chief Justice and Andrews L.J.

adopt this view. Best L.J. adopts the result, but I am not sure that he accepts the reason. On this view the son on the death of his father became the legal owner of the money on the deposit receipt, as is found by Megaw J. The presumption of advancement would make him the beneficial owner as between him and the estate. The presumption, however, would be negated were it not that the true intention of the father was to effectuate a fraud. It cannot be so negated, and therefore the legal and beneficial interests were in the son.

My Lords, if the presumption of advancement were fairly negated, in the circumstances, by proof of a different intention of the father, I should find myself unable to come to the conclusion that the father's intention was to effectuate an illegal purpose. However reprehensible the conduct of the executors and of Mr. Coleman may have been, I cannot find any evidence establishing a design by the father that his executors should commit perjury in their affidavit leading to probate. It is quite possible that the father really thought that taking out a deposit receipt in his boy's name as well as his own payable to the survivor prevented the money from passing on his death, as indeed would be the case but for provisions dealing with gifts and dispositions within a certain period of death. I should not therefore be prepared to negative the presumption of advancement on this ground.

But in my opinion, and in this respect I appear unfortunately to differ from some of the learned judges below and from some of your Lordships, the presumption of advancement is not only not negated by the facts but is in fact enhanced. The father knows, for he is told, that if the property is his when he dies, estate duty will have to be paid. He therefore enters into a contract by which the bank are bound to pay the money during his life to himself or his son and after his death to his son. He knows that if it passes under his will death duties must be paid; it will pass under his will if it still remains his. The inference seems irresistible that he intended that it should not be his at his death, that it should not pass under his will, in other words, that the son should have a present interest in it which the son alone could enforce

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H. L. (N. Ir.) on the father's death. Non-advancement defeats the avowed purpose ; advancement may, and, as the ill-instructed father thinks, will effect the purpose. The presumption, which is always a strong one, is in my submission to your Lordships not only not negatived but is directly supported. The same reasoning applies to the suggestion that the father intended that the 10,000*l.* should be tied up until the son attained the age of 25. It seems to me clear that he elected to withdraw this protection as to the 10,000*l.* as the price of avoiding death duties. He knew that what passed under his will paid death duties ; he knew that the limitation as to 25 only applied to the property passing under his will. He had determined not to pay death duties. I am therefore in agreement in the result, though not for the same reasons, with all the judges in Northern Ireland in their view that on the assumption that the legal title in the debt due from the bank on deposit account was in the son, the beneficial interest was also his.

It would become necessary therefore to consider how far the dealings with the account after the father's death discharged the bank. But before doing so I am compelled to notice an elaborate argument addressed to this House on behalf of the bank to the effect that the legal title never was in the son. It is said that the effect of the contract created by the deposit of 10,000*l.* by the father in the names of himself and his son, the opening of the joint deposit account and the giving and acceptance of the deposit receipt was the formation of a contract between the father alone and the bank. Neither the father nor the bank, it is said, purported to contract for or with the son ; the son was a third party who could acquire no rights against the bank. It was as though the father had opened an account in his own name making the sums payable to himself or his son, in which case it was said the son would clearly have to prove an independent contract between himself and the bank before he could sue the bank. My Lords, this contention seems to me to raise the one question of general importance in the case. It involves the whole question of the legal relations created by a bank deposit in

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this form. The argument, if correct, appears to me inconsistent with well established banking practice and likely to impair the confidence in deposits made in joint names. I consider it to be quite unfounded. It is, I think, significant that there appears no trace of such an argument having been put forward in the courts below. It would not have been attractive hearing for customers or potential customers of the bank in Belfast. It seems to have been reserved for the rarer atmosphere of your Lordships' House.

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The suggestion is that where A deposits a sum of money with his bank in the names of A and B, payable to A or B, if B comes to the bank with the deposit receipt he has no right to demand the money from the bank or to sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B's, or possibly that A had acted with B's actual authority. For the contract, it is said is between the bank and A alone. My Lords, to say this is to ignore the vital difference between a contract purporting to be made by A with the bank to pay A or B and a contract purporting to be made by A and B with the bank to pay A or B. In both cases of course payment to B would discharge the bank whether the bank contracted with A alone or with A and B. But the question is whether in the case put B has any rights against the bank if payment to him is refused. I have myself no doubt that in such a case B can sue the bank. The contract on the face of it purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract. If A has actual authority from B to make such a contract, B is a party to the contract ab initio. If he has not actual authority then subject to the ordinary principles of ratification B can ratify the contract purporting to have been made on his behalf and his ratification relates back to the original formation of the contract. If no events had happened to preclude B from ratifying, then on compliance with the contract conditions, including notice and production of the deposit receipt, B would have the right to demand from the

H.L. (N. Ir.) bank so much of the money as was due on the deposit account.

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In my view, therefore, if nothing had happened to prevent the son from ratifying the contract, he could sue the bank on the original deposit account. It would be no answer to say that the bank had paid the executors, for the contract was not to pay to the executors of either of the two names, but to the survivor. I think the case is rightly put on ratification, for I can find no sufficient evidence that the father had the actual authority of the son to enter into this contract on the son's behalf.

It remains to deal with a further argument of the bank which will not bear examination. Assume, it is said, that the son had all the rights he claimed, yet the contract provides that the receipt must be produced when payment is desired and as the son never did produce the receipt the action must fail. The fact is that the bank had themselves taken possession of the deposit receipt when they had, contrary to the terms of the contract and on this hypothesis wrongfully as against the son, paid the amount due on it and transferred the sum so paid to the account of the executors. At the time when they say the son ought to have produced the receipt to them they had themselves the wrongful possession of it in their strong room. To allow the bank in those circumstances to set up a breach of the condition would be contrary to all principle.

It remains then to consider whether the son still had the right to ratify, as I think he first sought to do, in October, 1930, 10 years after the original contract and four years after he had attained his majority. It is, I think, clear that he had from the beginning known: (1.) That the contract purported to be made on his behalf; (2.) that the money had been claimed and paid to his father's executors. I ignore any dealings with the money while the son was a minor, but in the period between November, 1926, and October, 1930, there was a series of transactions to the knowledge of the son, in which he played an active part and which were only consistent with the money having formed part of the father's estate and being paid to the executors as part of the estate.

It has been said that ratification must take place, if at all, H. L. (N. Ir.) within a reasonable time. I would prefer in this case to say that ratification cannot take place after the purported principal has by words or conduct intimated to the other party that he does not intend to ratify. I have come to the conclusion that the only reasonable inference that the bank would draw from the son's conduct was that he was content that the money should be applied as part of his father's estate and that he did not propose to make a claim on his own behalf. I do not think for this purpose that it is necessary that he should have known the full extent of his rights. The facts are that ratification, or no ratification, was in suspense, and that the son by his conduct gave the bank reasonably to believe that the decision was no ratification.

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I come to the conclusion therefore that the son never acquired the right to sue the bank on the contract. It becomes unnecessary on this view to consider whether if the son had acquired the right to sue, the bank could have relied on their plea of payment. I am much impressed by the view taken by Best L.J. on this question, but I express no final opinion. I agree that the appeal should be dismissed.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order dated April 24, 1933, of the Court of Appeal of Northern Ireland (the Lord Chief Justice of Northern Ireland and Andrews L.J., Best L.J. dissenting), whereby an appeal from the judgment, dated June 22, 1932, of the Chancery Division of the High Court of Justice (Megaw J.), dismissing the action hereinafter mentioned was dismissed.

The action was commenced on April 27, 1931, by the appellant as plaintiff, against the respondents as defendants. By the statement of claim the appellant claimed, amongst other things, a declaration that he was entitled to the moneys represented by the deposit receipt of the respondents for 10,000*l.* hereinafter mentioned, an account of the interest due in respect of that sum and payment of 10,000*l.* together with the interest found due in respect thereof.

The substantial defences were first a non-admission that

H. L. (N. Ir.) the plaintiff was entitled to the sum in question ; secondly,
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payment to the executors and trustees of John McEvoy as the persons entitled thereto of the principal moneys and interest, and thirdly that such moneys were so paid with the consent and approval of the plaintiff and were paid and applied by the executors and trustees to his use and have inured for the benefit of the plaintiff. The defendants whilst denying liability brought into Court 594*l.* 11*s.* 2*d.* and said that that sum was enough to satisfy the plaintiff's claim to payment.

The first and second of the above defences raise the same issue, namely, whether the appellant was entitled to receive for his own benefit the moneys in question or whether the persons so entitled were the executors and trustees of his father's will to whom the moneys had been actually paid.

The trial judge in effect decided these issues in favour of the appellant and his decision on this point was accepted by the majority of the Court of Appeal, but both Courts accepted the defence of consent and approval and on that ground the trial judge gave judgment for the respondents except as to the moneys paid into Court, as to which he made a special order not material for the present purpose, and the Court of Appeal dismissed the appellant's appeal and varied the order as to the money in Court.

I will now state the relevant facts as shortly as possible and particularly those relating to the issue of title, for, if the appellant fails to establish his claim to the 10,000*l.* and interest, the second issue becomes of no importance.

For some years John McEvoy, the father of the appellant, carried on a successful business as a publican, a grocer and an undertaker at Newry. He had a banking account with the branch at Newry of the respondent bank. At all material times William Coleman was the manager at that branch.

The appellant in 1921 was John McEvoy's only child and was a boy of about 15 years of age. John McEvoy was a widower.

On June 1, 1921, John McEvoy deposited 10,000*l.* with the respondent bank in his own name. It was stated on the

face of the receipt that it must be produced when payment H. L. (N. Ir.) of either principal or interest was desired.

In the summer of that year John McEvoy suffered a breakdown in health and in July was critically ill. The appellant was summoned home from school to be with his father.

Mr. Coleman on July 19 received a message from John McEvoy that he wanted to see him after bank hours, and went over to his house accordingly. This interview is of the utmost importance. What took place is described by Mr. Coleman whose evidence was accepted by the trial judge. The judge's note is as follows:—"Was very ill—internal disease; he realized that he was near death—Adamson and E. Kinney" (two of the four persons afterwards appointed as his executors) "were with him. Had conversation—about his affairs—will—generally. Told me he was going to settle affairs—gave names of four executors. He said he was going to leave all to his son, to tie it up till he was 25. That Miss Kinney" (his sister-in-law) "would manage business. Conversation about deposit receipt 10,000*l.* Related to Estate Duty. McEvoy very careful and not anxious that Estate Duty should be paid. He said so. Adamson also said he would not pay Estate Duty at any price. They asked my opinion. I said I could not tell them. Then they said if there could be two names would it meet the case. Mr. McEvoy and Mr. Adamson also. I said I didn't know, they should see their lawyer; he would be able to advise them. Agreed to send it"—presumably the proposed new deposit receipt—"over in the morning to put in two names—McEvoy gave the directions. He said put in names of self and son payable to either or the survivor."

To my mind the effect of this interview is clear. The suggestion of placing the deposit in the two names was simply in reference to its possible effect in regard to estate duty, and implies no departure on the part of John McEvoy from his expressed intention to leave everything to his son "to tie it up till he was twenty-five." Nor do I see in the suggestion itself anything illegal. The people seem

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H. L. (N. Ir.) to have had a vague notion (not dispelled by Mr. Coleman who surely knew better) that the outward form would possibly succeed in an evasion of duty which would not be illegal. The illegality, of which so much was made in the Courts below, consisted in the deliberate and fraudulent exclusion by the executors from their accounts of the 10,000*l.* and another deposit of 2000*l.* in the testator's own name. There is no evidence that such misconduct was contemplated until after the testator's death, and certainly he was in no way responsible for it.

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On the day following the interview just described the appellant and his father went to the office of the bank, and the father, in his son's presence, had another interview with Mr. Coleman. On that occasion Mr. Coleman signed on the deposit note for the 10,000*l.* a statement that the 10,000*l.* was paid that day, and the endorsement on the note contains a statement signed by Mr. McEvoy that the 10,000*l.* had been redeposited, the interest, amounting to 56*l.* 14*s.* 3*d.*, being otherwise disposed of as stated thereon. On the same day a new deposit receipt was issued over the signature of Mr. Coleman. It was in the following terms:—"Belfast Banking Co., Ltd., Newry, 20th July, 1921. Received from John McEvoy, Esq., and Mr. Joseph McEvoy (a minor), Newry, the sum of ten thousand pounds sterling for credit in Deposit Account. Not transferable.

"For the Belfast Banking Co., signed 'W. H. Coleman, manager,' payable to either or the survivor. This receipt must be produced when payment of either principal or interest is desired."

I will assume that the appellant went with his father to the bank and was present at the interview between his father and Coleman—though Coleman denies that he was there—but he does not recollect what was said, and clearly took no part in the transaction. He says expressly that his father said nothing to him on the matter.

The deposit receipt was retained by John McEvoy and was among the effects of which the executors took possession at his death. During his life he had the absolute right to

withdraw the 10,000*l.* or any part thereof if he so pleased. H. L. (N. Ir.)

Under these circumstances he made his will on August 10, 1921. By that will he appointed four executors and trustees, namely, James Adamson, Patrick McEvoy and James and Edward Kinney. He gave, devised and bequeathed to his said executors and trustees all his property of every kind whatsoever in trust in the first place to pay thereout his debts and funeral and testamentary expenses and then to pay certain legacies, and he directed that all the residue and remainder of his property was to be held in trust for his son, the appellant, until he should attain the age of 25 years, and on his attaining that age for him absolutely and pending his attaining that age he authorized his business to be carried on by his sister-in-law, Alice Kinney, on such terms as his executors in their absolute discretion might arrange.

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The testator died on September 20, 1921, and his will was proved by all the executors on December 16, 1921.

On January 25, 1922, the executors endorsed the deposit receipt of July 20, 1921, and upon such endorsement the respondents paid to them the sum of 10,000*l.* and the interest thereon. On the same day the executors redeposited the 10,000*l.* in their own names and a deposit receipt was issued payable to them, the survivor or survivors. This deposit receipt was not handed over to the executors, but was retained by the respondents.

For the present purpose it is unnecessary to state the subsequent dealings with the moneys in question. It is enough to say that with the exception of the sum of 2706*l.* invested in the purchase of certain houses which were ultimately conveyed to the appellant and as to which there is no dispute, the whole of the fund and the interest thereon has been applied by means of successive withdrawals in or towards payment of the constantly increasing overdraft on the current account of the executors with the respondents in relation to the business carried on by them. The successive deposit receipts were all retained by the respondents.

What then were the rights of the appellant and the



H. L. (N. Ir.) executors respectively in reference to the 10,000*l.* in question ?

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The legal and technical effect of the contract evidenced by the deposit receipt is I think doubtful. Did the father purport to act as agent for his infant son so as to make the latter a party to the contract, or was the contract made with the father alone for the benefit of the son as a third party ? In my opinion it is unnecessary to answer this question, for I think the real question is not whether the appellant would, as the effect in law of the contract, have been held entitled to be paid the money by the respondents, but what in the view of a Court of Equity would be the position between him and the executors ; would he be held entitled to retain the moneys, if so paid, for his own benefit, or must he hand them over to the executors to be dealt with as part of the testator's estate ? The material circumstances are these : The money deposited was that of the father alone, the son was a mere volunteer. The intention of the father as to the disposition of his estate was clearly expressed at the interview of July 19, 1921. The form of the deposit receipt in no way operated to alter this intention ; it was adopted for another purpose. The money was entirely at the father's disposal during his life. The will as actually made gives effect to the expressed intention of the father and there is no evidence of any animus donandi except subject to the testamentary directions. The residuary personal estate including the deposit of 2000*l.*, but excluding the 10,000*l.*, in question was so small that it is impossible to suppose that the testator deliberately intended to withdraw so important an item as the 10,000*l.* from the fund to be administered by the executors and trustees until the son should attain 25. Finally the illegal proceedings of the executors, so much relied on by the trial judge, were entirely irrelevant, inasmuch as the testator was not in any way implicated in them. On the whole then I am satisfied that if the matter had been brought before a Court of Equity the decision would have been in favour of the executors, namely, that they alone were entitled to receive the money and to apply it in due course of administration as directed by the testator's will. Whether

this result would be arrived at by way of a resulting trust, H. L. (N. Ir.) advancement being rebutted by express intention, or by a shorter road seems to me to be irrelevant.

Most unfortunately, as I think, the officers of the respondent bank, by accepting and acting on the endorsement of the executors, chose, with, I cannot but infer a shrewd eye to the pecuniary interests of the bank, to decide the matter for themselves without taking any care to protect the interests of the infant appellant. The proper course in my opinion would have been either to institute proceedings making the executors and the infant by his guardian ad litem defendants, and asking for directions as to the disposal of the money, or to refuse to act except under the directions of the Court, leaving the executors or the infant to institute the necessary proceedings. In either case the infant would have been duly represented, he would become a ward of Court, a guardian would be appointed and due provision made for his custody, maintenance and education, and generally for his protection. On his attaining 21 which happened on November 14, 1926, he would have the advantage of having been properly represented, and of obtaining any necessary information as to his rights under the will. Although, however, I think the bank acted without due consideration of the infant's rights, the payments to the executors were in my opinion in accordance with their rights, and the irregular action of the bank cannot affect the validity thereof.

On the grounds above expressed, I am of opinion that the claim of the appellant to repayment by the respondents fails, and this appeal ought to be dismissed, and it becomes unnecessary to examine the various dealings with the fund, or the grounds on which the Courts below decided the case in the respondents' favour, except to say that I see no reason to doubt the soundness of the conclusions at which they arrived.

I think the appeal should be dismissed, and, though with some regret, I think the appellant must pay the costs of the appeal. The directions of the Court of Appeal as to

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H. L. (N. Ir.) the fund in Court will stand unaltered with the rest of their Order.

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My Lords, I am asked to say that my noble and learned friend Lord Macmillan concurs in this judgment.

LORD THANKERTON. My Lords, according to its terms the deposit receipt for 10,000*l.* dated July 20, 1921, would be evidence of a contract between the bank and the son as well as the father ; but it is only an item of evidence though an important one. In the somewhat unusual circumstances of this case I am satisfied, on the evidence as a whole, of which the deposit receipt only forms part, that the father did not purport to act as agent for his son in making the contract, so as to make the son a contracting party, but that the father alone contracted with the bank, though for the benefit of the son as a third party. This being my view of the evidence, I agree with the conclusions of my noble and learned friend Lord Warrington. I may add that if I had taken the view that the father purported to make the son a contracting party, I should have agreed with the opinion delivered by my noble and learned friend on the Woolsack.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, June 28, 1934.

Solicitors for appellant: *Herbert Z. Deane & Co. for Fisher & Fisher, Belfast and Newry.*

Solicitors for respondents: *Coward, Chance & Co. for O'Hare & O'Hagan, Newry.*

[PRIVY COUNCIL.]

OFFICIAL ASSIGNEE OF MADRAS . . . APPELLANT ; J. C.*
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 MERCANTILE BANK OF INDIA, LIMITED RESPONDENTS. Oct. 15.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Pledge—Railway Receipt—Document of Title—Railway Receipt handed to pledgor for special purpose—Insolvency—Possession, order or disposition—Equitable Charge on goods—Bankers—Indian Contract Act (IX. of 1872), s. 178—Presidency-towns Insolvency Act (III. of 1909), s. 52, sub-s. 2 (c).

A railway receipt, providing that delivery of the consigned goods is to be made upon the receipt being given up by the consignee, or by a person whom he names by indorsement thereon, is a document of title within the meaning of the Indian Contract Act, 1872, s. 178 (for which a new section was substituted by the amending Act IV. of 1930), and a pledge of a railway receipt operated under the repealed section as a pledge of the goods. The pledgee does not release the pledge by handing the receipt to the pledgor in order that he may collect the goods from the railway company and place them in a warehouse upon behalf of the pledgee.

Goods so pledged are not in the possession, order or disposition of the pledgor within the meaning of s. 52, sub-s. 2 (c), of the Presidency-towns Insolvency Act, 1909, even where the railway receipt has been handed to the pledgor for the purpose above stated.

Further, where the owner of goods hands to a bank indorsed railway receipts relating thereto as security for an advance (even without a formal letter of hypothecation), there is constituted, in the absence of evidence to the contrary, an equitable charge upon the goods which is binding between the owner and the bank without notice to those having custody of the goods ; upon a subsequent insolvency of the owner the assignee takes no higher right than the owner had at the commencement of the insolvency.

Decree of the High Court, I. L. R. 56 Mad. 177 affirmed.

APPEAL (No. 44 of 1933) from a decree of the High Court at Madras (April 18, 1932) reversing an order made by Waller J. in the exercise of the insolvency jurisdiction of the Court.

By a notice of motion by the appellant in the insolvency of

* *Present* : LORD ATKIN, LORD MACMILLAN, LORD WRIGHT, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

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C. K. Narayana Ayyar & Sons, who were adjudged insolvents on February 11, 1929, the appellant claimed a declaration that the respondent Bank had no valid pledge of, or any right to, certain bags of groundnuts; or alternatively a declaration that the said groundnuts were in the possession, order or disposition of the insolvents at the commencement of the insolvency with the consent of the true owners within the meaning of s. 52, sub-s. 2 (c), of the Presidency-towns Insolvency Act, 1909; and an order directing payment to the appellant of the proceeds of the said groundnuts together with interest.

Pleadings having been directed, the respondents by their written statement stated that the railway receipts for the goods were indorsed and handed to them by the insolvents to secure advances made by them to the insolvents; they denied that the goods were in the possession, order or disposition of the insolvents.

The facts of the case, and the material provisions of the Indian Legislature, appear from the judgment of the Judicial Committee.

Waller J. heard the motion and made an order as prayed.

An appeal by the Bank was allowed and the motion dismissed. The judgment was delivered by Stone J. and concurred in by Beasley C.J. The appeal is reported at I. L. R. 56 Mad. 177.

1934. July 17, 19, 20. *van den Berg K.C.*, *Moresby*, and *Hon. Quintin Hogg* for the appellant.

Stuart Bevan K.C. and *Sir Thomas Strangman* for the respondents.

The arguments appear in a report of the appeal at L. R. 61 I. A. 416.

Oct. 15. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellant is the Official Assignee of Madras in whom the property vested on insolvency of C. K. Narayana Ayyar & Sons (who will be referred to hereafter as the insolvents); the question in the appeal is whether the appellant or the respondents are entitled to the proceeds of certain consignments of groundnuts; the primary issue is

whether the respondents who had advanced moneys on the security of the railway receipts in respect of these groundnuts obtained a valid pledge of the goods. Certain further or alternative questions will be dealt with subsequently.

The appellant succeeded before Waller J. ; his decision was, however, reversed on appeal by the High Court of Judicature of Madras, Appellate Jurisdiction ; the appellant now appeals to His Majesty in Council.

There is little dispute about the facts. The insolvents did a large business in groundnuts, which they purchased from the up-country growers ; the nuts were then despatched by rail and arrived in Madras by one or other of two railways, the Madras & Southern Mahratta Railway or the South Indian Railway. There was a working arrangement between these railways and the Madras Port Trust, which worked its own railway system within the port and took over the consignments of nuts when they arrived at the port. The Port Trust had its transit sheds, but there were also on its premises godowns leased to traders. One such godown, referred to as the X warehouse, was leased to the insolvents, but there was on it a signboard bearing the name of the respondents. For many years the respondents had financed the consignments of nuts purchased and consigned by the insolvents ; their method was to grant loans against particular consignments. The general course of business was for the insolvents to obtain from the railway companies in respect of each consignment or wagon load a railway receipt which will later be more particularly described ; sometimes, however, the up-country seller appeared as consignor and consignee, in which event the receipt was indorsed and delivered to the insolvents ; sometimes the seller was named on the receipt as consignor, while the insolvents were consignees ; in other cases the insolvents were named on the receipt both as consignors and consignees. Each receipt gave full particulars relating to the goods, the wagon number, the marks of the bags, the number, and so forth. It contained the following condition : “ That the railway receipt given by the N.G.S. Railway Company for the articles delivered for conveyance must be given up at destination by the consignee

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to the railway company or the railway may refuse to deliver and the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must indorse on the receipt a request for delivery to the person to whom he wishes it made, and if the receipt is not produced the delivery of the goods may, at the discretion of the railway company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the railway company."

The condition recognizes a practice of allowing delivery without production of the receipt analogous to that often followed in the case of bills of lading, whereby delivery is made on an indemnity if bills of lading are not forthcoming. As in general the insolvents wanted loans against consignments their practice was to bring or send to the respondents the railway receipts, duly indorsed by them in blank, with a letter of hypothecation and a promissory note, and, if the values were satisfactory and the transaction was in order, the loan was granted, the insolvents executing a promissory note for the amount and the letter of hypothecation, which was duly completed with full particulars of the security. The railway companies were, no doubt, aware of this general course of business, but were not notified that it had been followed in respect of any particular transaction. When the goods arrived at the port, delivery was taken from the Port Trust against the railway receipts; these the respondents had retained, but in order to enable them to obtain delivery the practice was to hand them to the representative of the insolvents, who paid freight and unloaded the goods from the wagons into the X warehouse, where they came into the actual possession of the respondents.

The insolvents were adjudicated bankrupt on February 11, 1929, the date of the insolvency being February 7, 1929. At that latter date the goods, which are the subject of this appeal, consisted of 7993 bags of groundnuts, represented by 46 railway receipts; all the goods were at the time either in transit on the railway or in the transit sheds or godowns of

the Port Trust. Of the 46 receipts, 14 representing 2975 bags had been presented on February 7, 1929, to the Port Trust by the insolvents, who had received them from the respondents, in accordance with the method and for the purpose described above, but the Port Trust refused to give delivery and unloaded these bags into its own sheds or godowns because payment of the freight was not forthcoming; the remaining 32 receipts were presented by the respondents after the insolvency; in view, however, of the dispute which culminated in the present suit, delivery was refused by the Port Trust, and all the goods were eventually sold under orders of the Court, the proceeds being held by the respondents to abide the result of these proceedings.

The main question (putting aside for the moment any consideration of the letter of hypothecation) is whether the pledging of the railway receipts was a pledge of the goods represented by them or merely a pledge of the actual documents, that is, what has been called a pledge of the ipsa corpora of the documents. The solution of the question depends on the true effect of s. 178 of the Indian Contract Act, 1872, as then in force; that section, which has since been repealed by the Indian Contract (Amendment) Act, 1930, and replaced by a new s. 178, was in the following terms: "A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly: Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence or fraud."

By s. 172 a pledge is defined as "the bailment of goods as security for payment of a debt or performance of a promise."

The first matter to be decided is whether a railway receipt such as those in question is a document of title to the goods within the section. Their Lordships are of opinion that it is.

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 1934 held that a railway receipt was an "instrument of title"
 OFFICIAL within s. 103 of the Contract Act; the Board said in that case
 ASSIGNEE that no distinction could be drawn between the term "document
 OF MADRAS of title" and the term "instrument of title"; and accordingly
 v. also held that the railway receipts were documents of title to
 MERCANTILE goods within s. 178. Their Lordships likewise in the present
 BANK OF case see no reason for giving a different meaning to the term
 INDIA, LD. in s. 178 from that given to the terms in ss. 102 and 103; in
 addition a railway receipt is specifically included in the defini-
 tion of "mercantile document of title to goods" by s. 137 of
 the Transfer of Property Act, 1882, which, in virtue of s. 4 of
 the Act, is to be taken as part of the Contract Act as being a
 section relating to contracts. A railway receipt is now included
 in the definition of documents of title to goods in s. 2, sub-s. 4,
 of the Indian Sale of Goods Act, 1930.

The two questions which next arise on s. 178 are (1.) Whether the words "a person who is in possession of any goods or of any bill of lading," etc., include the owner, and (2.) whether a pledge of the documents is a pledge of the goods as distinct from the documents. The questions must be separately considered; both depend on the words of the section read in connection with the rest of the Act.

But the arguments advanced on behalf of the appellant have sought to treat the matter as concluded by the history and present state of the relevant law in England, which will now be briefly summarized. At the common law a pledge could not be created except by a delivery of possession of the thing pledged, either actual or constructive. It involved a bailment. If the pledgor had the actual goods in his physical possession, he could effect the pledge by actual delivery; in other cases he could give possession by some symbolic act, such as handing over the key of the store in which they were. If, however, the goods were in the custody of a third person, who held for the bailor so that in law his possession was that of the bailor, the pledge could be effected by a change of the possession of the third party, that is by an order to him from the pledgor to

hold for the pledgee, the change being perfected by the third party attorning to the pledgee, that is acknowledging that he thereupon held for him ; there was thus a change of possession and a constructive delivery : the goods in the hands of the third party became by this process in the possession constructively of the pledgee. But where goods were represented by documents the transfer of the documents did not change the possession of the goods, save for one exception, unless the custodier (carrier, warehouseman or such) was notified of the transfer and agreed to hold in future as bailee for the pledgee. The one exception was the case of bills of lading, the transfer of which by the law merchant operated as a transfer of the possession of, as well as the property in, the goods. This exception has been explained on the ground that the goods being at sea the master could not be notified ; the true explanation may be that it was a rule of the law merchant, developed in order to facilitate mercantile transactions, whereas the process of pledging goods on land was regulated by the narrower rule of the common law and the matter remained stereotyped in the form which it had taken before the importance of documents of title in mercantile transactions was realized. So things have remained in the English law : a pledge of documents is not in general to be deemed a pledge of the goods ; a pledge of the documents (always excepting a bill of lading) is merely a pledge of the ipsa corpora of them ; the common law continued to regard them as merely tokens of an authority to receive possession, though from time to time representations were made by special juries that in the ordinary practice of merchants transfers of documents were understood to pass possession, as for instance in 1815, in *Spear v. Travers*. (1) The common law rule was stated by the House of Lords in *William McEwan & Sons v. Smith*. (2) The position of the English law has been fully explained also more recently in *Inglis v. Robertson* (3) and in *Dublin City Distillery, etc., Ltd. v. Doherty*. (4) But there also grew up that legislation which is compendiously described as the Factors Acts, the first in

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(1) (1815) 4 Camp. 251.

(3) [1898] A. C. 616.

(2) (1849) 2 H. L. C. 309.

(4) [1914] A. C. 823.

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1823, then an Act in 1825, then an Act in 1842, then an Act in 1877, and finally, the Act in 1889 now in force. The purpose of these Acts was to protect bankers who made advances to mercantile agents: that purpose was effected by means of an inroad on the common law rule that no one could give a better title to goods than he himself had. The persons to whom the Acts applied were defined as agents who had in the customary course of their business as such authority to sell goods or to consign goods for sale or raise money on the security of goods; in the case of such persons thus intrusted with possession of the goods or the documents of title to the goods, the possession of the goods or documents of title to the goods was treated in effect as evidence of a right to pledge them, so that parties bona fide and without notice of any irregularity advancing money to such mercantile agents on the goods or documents were held entitled to a good pledge, even though such mercantile agents were acting in fraud of the true owner. Sect. 3 of the Factors Act, 1889, provides that "a pledge of document of title to goods shall be deemed to be a pledge of the goods." It has been held that this section only applies to transactions within the Factors Act: *Inglis v. Robertson*. (1)

Thus the curious and anomalous position was established that a mercantile agent, acting it may be in fraud of the true owner, can do that which the real owner cannot do, that is, obtain a loan on the security of a pledge of the goods by a pledge of the documents, without the further process being necessary of giving notice of the pledge to the warehouseman or other custodian and obtaining the latter's attornment to the change of possession. But it is obvious that the ordinary process of financing transactions in goods is much facilitated by ability to pledge the goods by the simple process of pledging the documents of title. It need not be repeated that bills of lading stand apart, nor need it be observed here that some warehousing companies have, by means of private Acts, assimilated their warrants or delivery orders to bills of lading for this purpose.

It has been strenuously contended on behalf of the appellant

(1) [1898] A. C. 616.

that s. 178 of the Contract Act of 1872 must be construed as embodying the same principles as those of English law, that is, as being limited to mercantile agents, or at any rate to persons other than the owner of the goods. The Indian Factors Act, 1844, which extended to India the provisions of the English Factors Act, 1842, was invoked in argument on both sides, particular reliance being placed on s. 4 of that Act. That section defines documents of title in the same terms as the English Act, and proceeds to enact that any agent duly entrusted and possessed of any such documents of title shall be deemed to have been entrusted with the possession of the goods represented by it, and that all pledges of, and liens upon, the documents shall be deemed to be pledges of, and liens upon, the goods to which the same relate. The latter provision is the same in substance as that which is now reproduced in s. 3 of the English Act of 1889.

But s. 178 of the Contract Act, 1872, has omitted the word "agent," and has without express qualification made the section apply to "a person who is in possession of any goods or of any bill of lading, etc." The Appellate Court have decided that these unqualified words are wide enough to cover the owner as well as any mercantile agent. Their Lordships agree with that ruling. It was pointed out by this Board in *Ramdas's* case (1) that the Act of 1872 was an amending as well as a consolidating Act, and that beyond the reasonable interpretation of its provisions, there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Their Lordships did not in that case see any improbability in the Indian Legislature having taken the lead in a legal reform.

It may well have seemed that it was impossible to justify a restriction on the owner's power to pledge which was not imposed on the like powers of the mercantile agent. The same observation may well be true in regard to the words now being considered. The reasonableness of any such change in the law is well illustrated by the facts of the present case, where it was clearly intended to pledge the goods, not merely the railway

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receipts, and the respondents have paid in cash the advances they made on that footing. In these circumstances, it would be indeed a hardship that they should lose their security. That such a hardship would still be experienced in England in the like case is no argument against their Lordships' conclusion. Nor is it an argument that s. 178 as subsequently amended in 1930, and now in force, has in terms limited the privileges under it to the case of pledges by mercantile agents. The construction of the section now in question must depend on its precise words ; these words would, no doubt, include cases where the pledgor was a mercantile agent, but there is nothing in the section requiring its scope to be so limited or to exclude the owner from its operation. The Indian Legislature may well have appreciated in 1872 the exigencies of business, even though in 1930 they recanted. Or perhaps they did not appreciate fully the effect of the actual words of the section. But these words must be construed as they stand. There has been, in fact, no decision in India contrary to the view that "any person, etc.," includes an owner ; the decisions appear to have turned on the meaning of the word "possession," and on such distinctions as that between mere custody and juridical possession. An examination of ss. 103 and 108 of the Act seems rather to strengthen than to weaken the construction which the respondents contend for, and which appears to their Lordships to be right.

The other question arising under s. 178, namely, whether under its terms a pledge of the documents amounts to a pledge of the goods should also, in their Lordships' judgment, be answered, as it was by the Appellate Court, in favour of the respondents. The principle that goods might be pledged by pledging the documents of title had been fully established by the Act of 1844, as already explained ; the actual words of s. 178 are susceptible of being construed as meaning that under that section the same rule was intended. No doubt the language of s. 178 is abbreviated ; but "a valid pledge of such goods or documents," may more properly be interpreted as identifying the pledging of one with the pledging of the other. It is to be noted that the list of documents enumerated is headed by

“bill of lading,” the pledging of which admittedly involves a pledging of the goods, and it seems that as the language of the section applies equally to bills of lading and all the other documents, all these documents are intended to be assimilated for purposes of pledge, so that the pledging of any one of the classes of documents enumerated has the same effect as the pledging of a bill of lading. This was the view adopted in regard to railway receipts in *Ramdas's* case. In that case it was held that the pledging of a railway receipt had the same effect on the right of stoppage in transitu under s. 103 as a pledging of the goods ; the railway receipt quoad this matter was assimilated to a bill of lading. It seems difficult to deny the same consequence under s. 178 to a pledge of the documents, especially as the Board held in *Ramdas's* case (1) that documents and instruments of title had the same meaning in both sections. A “pledge” is defined as stated above to be a bailment of goods as security (s. 172), hence it seems that s. 178, the marginal note to which is “pledge by the possessor of goods or of documentary title to goods,” can only be dealing with pledges of goods, though the section uses the words “pledge of such goods or documents.” In other words it is describing a pledge of goods, either by pledging the goods *eo nomine* or by pledging the relative documents.

On this construction of s. 178 the respondents were, on the facts of the case, entitled to their security in the groundnuts represented by the 46 railway receipts as being validly pledged to them.

It was contended that even on this view the goods represented by the 14 railway receipts presented on February 7, 1929, were in a different position, because, it was said, the respondents had parted with their pledge on these goods by giving back possession of the railway receipts to the insolvents. In their Lordships' judgment this contention is based on a misuse of the word “possession.” The respondents did not part with the possession of the goods or receipts in the juridical sense of that word ; they merely parted with the custody, by entrusting the receipts to the insolvents as their agents or mandatories

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for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and unloading them from the railway wagons or transit sheds and putting them into the X godown warehouse on behalf of the respondents. Such action does not involve a parting with possession and accordingly it does not in any way affect rights of pledge; the redelivery by the pledgee to the pledgor for a limited purpose without the pledgee thereby losing his right, is illustrated by *North Western Bank, Ltd. v. Poynter* (1) and the more recent case *In re David Allester, Ltd.* (2) In both these cases the limited purpose was in order that the goods should be realized by the pledgors as experts in that class of business. In this case the limited purpose was that the goods should be handled, not by the respondents who were bankers, but by those whose business it was to do so. Such procedure is in the usual course of business, and is obviously either necessary, or at least convenient for the conduct of the business in question. This point also fails the appellant.

The above conclusions are sufficient to dispose of the appeal, but a further point taken on behalf of the respondents would in itself, in the opinion of the Board, be sufficient to decide the appeal in their favour. Reference has already been made to the letter of hypothecation, which, in the case of each advance, was completed by the insolvents. The finding of the trial judge on this point is that "in order to finance the transaction the insolvents took the railway receipts to the bank with promissory notes and letters of hypothecation." The letter of hypothecation was in terms an acknowledgment by the insolvents that they had deposited the property documents and securities thereunder mentioned as collateral security for the advance, with a power of sale in the case of default and various ancillary provisions. This letter, in their Lordships' judgment, constitutes a good equitable charge which is binding between the insolvents and the respondents, and is equally binding on the appellant who, for this purpose, merely stands in the insolvents' shoes, and has as against the respondents no higher or better right than the insolvents had

(1) [1895] A. C. 56.

(2) [1922] 2 Ch. 211.

at the date of the insolvency. An analogous case was considered in *Ex parte North Western Bank* (1), where a letter of lien over wools of the bankrupt which were in his warehouse, was held to create a good equitable charge in favour of bankers who had made advances; no delivery of the warrant for wools had been made; but it was held that the bankers had a good title against the trustee in bankruptcy. This authority was followed and approved in *re Hamilton Young & Co.* (2) In that case the traders, who had obtained advances from bankers on the security of cloth of the traders then in the hands of bleachers, gave letters of lien to the bankers accompanied by the bleachers' receipts for the goods. The Court of Appeal rejected the argument that the letters of lien were void under the Bills of Sale Act: such matters are not here material, because in India there is no legislation corresponding to the Bills of Sale Acts. Apart from that question Vaughan Williams L.J. thus summed up the general position (3): "The result of the practice detailed seems to be that, in respect of the matter and preparation and shipment of the goods, the management and direction of these goods, for the purposes of bleaching, dyeing, and shipping, until the bills of lading were handed over, rested entirely with [the debtors], and that no property, other than by way of lien or charge, would pass to the bank until the bills of lading were handed over, but that the bank had in equity a right to an injunction restraining [the debtors] from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank."

There was in that case notice by the bank of their lien to the bleachers shortly before the insolvency, but the statement of the bankers' rights in equity as against the debtors, and consequently as against the trustee in bankruptcy, is not made with reference to any question of notice. The rights between the immediate parties do not depend on notice, just as in the case of an equitable assignment of a debt notice is not necessary to complete the equitable right as between assignor and

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(1) (1872) L. R. 15 Eq. 69.

(2) [1905] 2 K. B. 772.

(3) Ibid. 784.

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assignee. Thus in *William Brandt's Sons & Co. v. Dunlop Rubber Co., Ltd.* (1), it is clear that there was a good equitable assignment as between the merchants as assignors and the financiers as assignees, though the assignment was not completed in the sense that the debtors to the merchants were bound by it or bound to pay the assignees, without receiving notice of it. Thus Lord Macnaghten says: "As between Kramrisch & Co. [the merchants] and Brandts [the bankers] the assignment was . . . perfect without them" (sc. the documents giving notice to the debtors). In the same way in the present case, though it is true that no third party holding the goods or dealing with them without notice of the respondents' lien, would be affected by that lien, this is a consideration which is irrelevant to the equitable rights constituted as between the respondents and the insolvents. In this case nobody's rights are concerned except the rights as between these immediate parties: the appellant merely stands in the insolvents' shoes.

A similar course of reasoning has been applied in India, for instance, in the case of *In re Ambrose Summers*. (2)

Some objection was raised on the hearing of the appeal that the question of the effect of the letters of hypothecation had not been an issue in the Courts below, and indeed that the letters of hypothecation had not been proved except in general terms. But both in the first Court and in the Appellate Court this issue is referred to, and the trial judge finds the facts. Before this Board the point was argued as an alternative, and in view of the conclusions stated above as to the application of s. 178 of the Contract Act, it may be regarded as not calling for decision. But this point by itself would be enough to decide the case against the appellant even if he were right in the construction of s. 178, for which he has contended.

A still further point was raised on behalf of the respondents; it was argued that if under s. 178 the respondents did not get a good pledge at law by the delivery of the railway receipts, still that delivery, considered on all the facts of the case, was evidence of a good equitable charge at least as between the immediate parties even ignoring the accompanying letters of

(1) [1905] A. C. 454, 462. (2) (1896) I. L. R. 23 Cal. 592.

hypothecation. That argument found favour with the Appellate Court, and their Lordships think it is well founded. Even if the documents of title are regarded as merely tokens of an authority to receive possession, it seems that their transfer for value by way of security for advances must at least raise an equity as between transferor and transferee entitling the latter to an order restraining the former from himself claiming delivery of the relative goods without producing the receipts; if so, the appellant must be subject to the same equity.

There still remains for consideration a final point raised on behalf of the appellant, which is that on any view of the case the consignments of nuts in question constitute property divisible among the creditors in virtue of s. 52, sub-s. 2 (c), of the Presidency-towns Insolvency Act, 1909, which corresponds with the similar clause in the English Bankruptcy Act, as "goods being at the commencement of the insolvency in the possession order and disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof." This point can be shortly here disposed of. If the goods in question were validly pledged under s. 178, as their Lordships have held, they were not in the possession of the insolvents, because the railway company held the goods as bailees of the respondents, the possession by the respondents of the documents of title being equivalent to the possession of the goods: hence these goods were not within the possession order and disposition of the insolvents at all; it is the respondents who were entitled to obtain delivery of the groundnuts from the railway company. A similar conclusion was arrived at on analogous facts in *Fakeerappa v. Thippanna*. (1) It was argued that a distinction must be drawn in this connection in regard to goods represented by the 14 railway receipts that were handed over to the insolvents' representative for the special purpose explained above, of unloading the goods into the X warehouse. Their Lordships, however, do not think that these goods are in any different position from the remainder for this purpose. The pledge was not affected by the handing

(1) (1913) I. L. R. 38 Mad. 664.

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over of the railway receipts for the limited purpose ; it was only for that purpose that the insolvents had the temporary possession, or rather custody, of the railway receipts, and, that being so, there is no ground for saying that the goods were in the possession order and disposition of the insolvents, still less that they were so with the consent of the true owners, that is the respondents, as pledgees. Nor could it be said either as to the consignments as a whole or as to the 14 consignments that the circumstances were such as to make the insolvents the reputed owners. Reputation in this connection has reference to a hypothetical individual who is assumed to know "those facts which are capable of being generally known to those who choose to make enquiry on the subject," in the sense explained by Lord Selborne in *Ex parte Watkins* (1) : the general course of business and the relationship of the interested parties to the consignments and in particular the purpose for which the insolvents had custody of the 14 receipts were inconsistent with any reputation of ownership in that sense. Reference may be made in this connection to the English cases of *Ex parte North Western Bank* (2), and *In re Hamilton Young & Co.* (3) The whole question under the clause is a question of fact, and their Lordships agree with the reasoning of the Appellate Court on this point also.

In the result the appeal should, in their Lordships' opinion, be dismissed with costs. They will humbly so advise His Majesty.

Solicitors for appellant : *Burton, Yeates & Hart.*

Solicitors for respondents : *E. F. Turner & Sons.*

(1) (1873) L. R. 8 Ch. 520, 529. (2) L. R. 15 Eq. 69.

(3) [1905] 2 K. B. 772.

[PRIVY COUNCIL.]

CHEE WOR LOK AND OTHERS	APPELLANTS ;	J. C.*
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YEOH SAW GEOK	RESPONDENT.	Oct. 22.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

*Straits Settlements—Benevolent Association—Construction of Rules—
Default of member—Forfeiture of benefits.*

Rule 17 of a benevolent association provided that the monthly deposit to be made under rule 16 should be payable by each member in advance on the 15th day of the month, and that "if his monthly deposit shall be two months in arrear" he was to be notified, and failing payment within twenty-one days was ipso facto to cease to be a member and forfeit all privileges:—

Held, that upon the true construction of rule 17 a member could be notified of default only if payment of a monthly deposit was two months in arrear; it was not sufficient that at the date of the notification two monthly deposits were in arrear.

Appeal dismissed.

APPEAL (No. 108 of 1933) from a judgment of the Supreme Court of the Straits Settlements, Penang (August 22, 1932), setting aside the judgment of a judge of that Court.

The respondent, the widow of one Lim Eow Hooi, brought an action against the appellants, representing the Chinese Benevolent Association of Penang, for a declaration that her husband at his death was a member of the Association. The appellants contended that under rule 17 of the rules of the Association the deceased had ceased to be a member owing to default in payment of the monthly deposits due from him.

The terms of the rule and the facts of the case appear from the judgment of the Judicial Committee.

The trial judge (Sawrey-Cookson J.) held that upon the true construction of the rule the deceased man had ceased to be a member; accordingly he dismissed the action.

* *Present* : LORD ATKIN, LORD ALNESS, and SIR SIDNEY ROWLATT.

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An appeal, heard by Huggard C.J., Mudie and Cobbett JJ., was allowed and the declaration made.

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The respondent did not appear.

The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from an order of the Court of Appeal of the Supreme Court of the Straits Settlements who set aside an order of Sawrey-Cookson J. The action was brought by the widow of a man who had been a member of the Chinese Benevolent Association at Penang, and it was for a declaration that the husband of the plaintiff at the date of his death was still a member of the Association and had not, as the Association claimed, automatically ceased to be a member by reason of default in paying subscriptions. The rules of the Benevolent Association are expressed in English, and the deceased had been a member since November of 1916. The objects of the Association are to encourage thrift and to make provision for a widow.

The rules state that membership commences from the first day of the month upon payment of deposit and fee for certificate of membership within thirty days of notice of election, and on payment of his monthly deposit and a certificate fee of \$2 a certificate of membership will be issued. Then they provide that "Each member shall deposit with the Association monthly the sum of \$2. Any member who wishes to deposit monthly an extra amount may do so." Then there comes the clause upon which the dispute arises: "The monthly deposit shall be paid in advance by every member on or before the 15th day of the month. In default he shall be liable to pay a fine of 10 cents for each such failure, which shall be debited to his account, and if his monthly deposit shall be two months in arrear he shall be notified, and failing payment of same in full after the expiration of twenty-one days he shall ipso facto cease to be a member and forfeit all privileges as a

member"; and then it provides what shall happen if he is re-admitted.

Now the facts in this case are that this man paid his monthly deposit for June in due course on or before June 15, 1932. In July he did not make any payment. Apparently he was ill—though that is immaterial for this case—and he died on September 24. In August he paid no deposit, and on August 16, in assumed accordance with the rule, he was notified that his deposits were in default. On September 8 he thereupon, according to the Association, automatically ceased to be a member, and, as has been said, he died on September 24, 1932.

Now the question is whether on August 16, when notice was given under the rule, his monthly deposit was, in fact, two months in arrear. The widow says no, the monthly deposit of July being due on July 15, on July 16 it was one day in arrear and on August 16 it was one month and one day in arrear and not two months in arrear. Therefore, it is said that the rule did not apply and that the man had not ceased to be a member. On the other hand, the Association say that is not the meaning of the rule; that what it does mean is that if subscriptions in respect of two months are in arrear then the rule applies. A monthly deposit, it is said, must be treated as something continuous, and the only question is whether the subscription in respect of two months is in arrear. It appears to their Lordships that one way of stating the question is whether the words mean "if any monthly deposit shall be two months in arrear," or whether they mean "if two monthly deposits are in arrear," which is the contention of the Association.

Now their Lordships think that it has to be remembered, in dealing with a clause of this kind, that it is of the nature of a forfeiture, and it has got to be reasonably clear that the forfeiture operates. Their Lordships find themselves unable to come to the conclusion that the Association have made out that the forfeiture did apply in this case. On the contrary, they agree with the view taken by the Court of Appeal of the Supreme Court. They think that on the true construction of

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this rule it means that in order to work a forfeiture a monthly deposit has to be in arrear for the period of two months ; in other words, that the period of two months applies to the period of default for each deposit and not to the number of subscriptions that have to be in arrear.

It is a simple question of construction. One can quite understand another view being taken, and no question arises but that the Association have put forward a bona fide claim in this case, intending to maintain what they think is the true construction of their rule. In their Lordships' opinion that is not the true construction of the rule, and therefore this appeal should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Herbert Z. Deane & Co.*

[PRIVY COUNCIL.]

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 Oct. 26.

OHENE MOORE APPELLANT ;
 AND
 AKESSEH TAYEE RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Gold Coast—Jurisdiction—Appeal from Paramount Chief's Tribunal—Condition to grant of leave to appeal—Native Administration Ordinance (Laws of Gold Coast Colony, 1928, c. III), s. 77, sub-s. 2.

Having regard to s. 77, sub-s. 2, of the Native Administration Ordinance of the Gold Coast Colony, there is no jurisdiction to hear an appeal from a Paramount Chief's Tribunal unless before leave to appeal was granted the taxed costs of the hearing have been paid in money, or a sum sufficient to satisfy them has been deposited in Court ; the Appellate Court cannot waive compliance with the above statutory requirements.

Appeal dismissed.

**Present* : LORD ATKIN, LORD ALNESS, and SIR SIDNEY ROWLATT.

APPEAL (No. 49 of 1933) from a judgment of the West African Court of Appeal (November 14, 1932) reversing a judgment of the Court of the Provincial Commissioner of the Western Province, and restoring a judgment of the Paramount Chief's Tribunal of Beyin.

The judgment appealed from dismissed, by a majority, an appeal from the Provincial Commissioner's Court upon the ground that there had been no jurisdiction to grant leave to appeal to that Court in the absence of strict compliance with the conditions enacted by the Native Administration Ordinance (Laws of the Gold Coast, 1928, c. III), s. 77, sub-s. 2.

The facts, and the terms of the section, appear from the judgment of the Judicial Committee.

1934. Oct. 26. *Montgomery K.C.* and *T.B. W. Ramsay* for the appellant.

The respondent did not appear.

The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the judgment of the West African Court of Appeal, Gold Coast Session, reversing a judgment of the Provincial Commissioner of the Western Province who had reversed a judgment of the Native Tribunal of the Omanhene of Beyin, and the question in the case is whether or not the Provincial Commissioner had jurisdiction to entertain at all the appeal from the Native Tribunal. The action was brought by the plaintiff for damages for trespass on his land and for unlawfully arresting the plaintiff's men. The Native Tribunal had give judgment for the defendant.

Now the rules regulating appeals from the Paramount Chief's Tribunal (which this was) are laid down by the Native Administration Ordinance, which is now Chapter III of the Laws of the Gold Coast Colony, 1928. By s. 77, sub-s. 1: "A party desiring to appeal from a Paramount Chief's Tribunal shall first obtain the leave of such Tribunal so to do; provided that, if the said Tribunal shall have refused such leave, the Provincial Commissioner's Court or the District Commissioner's Court may nevertheless grant leave to appeal."

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Then by sub-s. 2 it is provided: "Leave to appeal from the Paramount Chief's Tribunal shall not be granted unless and until the appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in the Court to which the appeal is being taken a sum of money sufficient to satisfy such costs; and such Court shall not grant a stay of execution with respect to the said costs."

An application was made to the Native Tribunal Court for leave to appeal and the Native Tribunal granted conditional leave to appeal on the following conditions. The respondent was "to deposit 10*l.* into Tribunal against cost of making up and transmission of appeal record; (2.) to enter into bond in sum of 21*l.* 2*s.* 6*d.* in two sureties of 25*l.* each to be justified against costs in Appeal Court; (3.) to give notice of the appeal to all parties affected by the appeal; (4.) conditions to be fulfilled within one month from date." On an affidavit by the respondent that those conditions had been fulfilled final leave to appeal was eventually given. Two bonds were entered into. One was a bond in the sum of 21*l.* 2*s.* 6*d.* and the other was in the sum of 50*l.*, each given by two sureties and each was conditional for the payment of costs in the appellate Court. So that in fact no provision was made for the costs in the first Court at all.

Now the unfortunate thing is that that order so made by the Court of first instance did not comply with the provisions of the statute which provides that "Leave to appeal from a Paramount Chief's Tribunal shall not be granted unless and until the appellant shall either have paid the costs in such Tribunal or shall have deposited therein or in the Court to which the appeal is being taken a sum of money sufficient to satisfy such costs." To begin with, a bond is not payment of money, and in the second place, if it had been a payment of money, these particular bonds are not conditioned for payment of the costs in the Native Tribunal but were conditioned for payment of costs in the appellate Court, though the amount of money, 21*l.* 2*s.* 6*d.*, appears to be the amount of the taxed costs in the Native Tribunal Court. It is sufficient to say that the statutory condition upon which

alone leave to appeal could be given was not fulfilled. When the appeal came before the Provincial Commissioner this point was taken, and he perhaps not unnaturally treated it as a technicality which he could sweep aside, and ordered that the costs incurred by the respondent, 21*l.* 2*s.* 6*d.*, in the Court of first instance should be at once paid to his Court, and that was eventually done. He then proceeded to allow the appeal.

Unfortunately, as was found by the majority of the Court of Appeal and as their Lordships think, the Provincial Commissioner had no jurisdiction to make any order at all, because no appeal was properly before him. After all, it is to be remembered that all appeals in this country and elsewhere exist merely by statute, and unless the statutory conditions are fulfilled no jurisdiction is given to any Court of justice to entertain them.

It is not unnatural that Howes J., dissenting in the full Court, did his utmost to try and uphold this order; but their Lordships find themselves unable to accept his reasoning. In the first place, he came to the conclusion that the costs referred to were only the costs in the Native Tribunal so far as they related to preparing and getting ready the appeal. That, in their Lordships' view, is not the meaning of the section which applies to the respondent's taxed costs of the hearing in the original Court. The other grounds which are referred to by the learned judge relate to powers which are given to an appellate Court to adopt certain procedure, to waive rules, and to try and do substantial justice—all very important powers, but which can only be brought into play once the appellate Court is seized of the appeal and has jurisdiction to entertain it.

But the objection lies in limine, in that the Provincial Commissioner had no jurisdiction at all; and therefore the reference to these powers unfortunately is irrelevant to the question of the Provincial Commissioner being able to give relief. It is quite true that their Lordships, as every other Court, attempt to do substantial justice and to avoid technicalities; but their Lordships, like any other Court, are

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bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other Court to have jurisdiction.

For these reasons their Lordships have come to the conclusion that the judgment given by the learned Chief Justice in the Court of Appeal is correct and they adopt his reasoning, and will therefore humbly advise His Majesty that this appeal should be dismissed.

Solicitors for appellant : *Douglas Grant & Dold.*

[PRIVY COUNCIL.]

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 Nov. 8.

W. F. O'CONNOR APPELLANT ;

AND

G. WALDRON RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Defamation — Slander — Absolute Privilege — Inquiry under Combines Investigation Act (R. S. Can., 1927, c. 26)—Words spoken by Commissioner.

An inquiry held under the Combines Investigation Act (R. S. Can., 1927, c. 26) is not an absolutely privileged occasion so as to render the commissioner appointed to conduct it immune from an action for defamation in respect of words uttered by him during the proceedings. The rule as to proceedings before judicial tribunals does not apply, because a commissioner under the above Act has not attributes similar to those of a Court of justice, nor does he act in a manner similar to those in which such Courts act ; he performs the administrative function of inquiring whether offences have been committed, and it is not material that for that purpose he has powers to summon witnesses, administer oaths, and punish disobedience to his orders.

Royal Aquarium and Summer and Winter Garden Society, Ltd. v. Parkinson [1892] 1 Q. B. 431, 432, approved and applied.

Judgment of the Supreme Court of Canada [1932] S. C. R. 183 reversed.

**Present* : LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, LORD WRIGHT, and SIR LANCELOT SANDERSON.

APPEAL (No. 43 of 1933) by special leave from a judgment of the Supreme Court of Canada (December 22, 1931) affirming a judgment of the Supreme Court of Ontario, Appellate Division (July 15, 1931), which affirmed a judgment of Orde J. (May 6, 1930).

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The appellant, a barrister, brought an action in the Supreme Court of Ontario against the respondent claiming damages for slander. Upon interlocutory proceedings the plaintiff alleged that the words complained of had been spoken by the respondent during an inquiry under the Combines Investigation Act, R. S. Can., 1927, c. 26, which he was conducting as commissioner appointed by letters patent under that Act.

The facts appear from the judgment of the Judicial Committee.

Upon a motion by the defendant, Orde J. dismissed the suit upon the ground that the occasion was absolutely privileged; an appeal to the Appellate Division was dismissed, Hodgins J.A. dissenting.

An appeal to the Supreme Court of Canada (Anglin C.J., and Rinfret, Lamont, Smith, and Cannon JJ.) was also dismissed; the appeal is reported at [1932] S. C. R. 183. Smith J., the other members of the Court concurring, said that he agreed with the reasons of Orde J. (65 Ont. L. R. 407), and of Middleton J.A. in the Appellate Division ([1931] O. R. 608). The learned judge added a consideration of the judgments in the English Court of Appeal in *Hearts of Oak Assurance Co., Ltd. v. Attorney-General* (1), which had been delivered since the decision of the Appellate Division. After referring to the powers given to the commissioner by the Act, the learned judge said that the judgments in the Court of Appeal seemed rather to support than to be against the judgment appealed from in the present case.

1934. July 10, 12, 13. *A. T. Miller K.C.* and *I. W. G. Barry* for the appellant. Under the Combines Investigation Act the commissioner was an administrative, not a judicial, officer. His duty was to report to the registrar, for the information

J. C. of the Minister, the oral and documentary evidence adduced upon the inquiry ; he had to come to no judicial determination, though he could express an opinion. The provisions of the Act were fully considered by the Board in *Proprietary Articles Trade Association v. Attorney-General for Canada* (1) and it was held that they did not interfere with the administration of justice. In *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* (2) the Board approved the definition of "judicial power" given by Griffith C.J. in *Huddart, Parker & Co. v. Moorehead* (3) ; that definition limits the expression to tribunals with power to give a binding decision. In the *Shell Co.*'s case (4) the Board pointed out that the authorities establish that a tribunal may have many of the powers of a court without being one in a strict sense. After the decision of the Supreme Court of Canada the decision of the Court of Appeal in *Hearts of Oak Assurance Co., Ltd. v. Attorney-General* (5) was reversed by the House of Lords and the dissenting judgment of Lord Hanworth M.R. approved. (6) That case related to an inspector who, like the commissioner in this case, had a statutory duty to hold an inquiry with powers to take evidence upon oath ; Lord Hanworth M.R. had held, for reasons which apply in this case (7), that the proceeding before the inspector was not a judicial proceeding. The commissioner was not a tribunal with attributes similar to those of a court of justice, and did not act in a similar manner, so as to be within the words of Lord Esher M.R. in *Royal Aquarium, etc., Ltd. v. Parkinson*. (8) In *Dawkins v. Lord Rokeby* (9), *Barratt v. Kearns* (10), and *Co-partnership Farms v. Harvey-Smith* (11) the nature and function of the tribunal considered differed from those of the commissioner. In *Collins v. Henry Whiteway & Co.* (12) a Court of Referees under the Unemployment Act was held not to be a judicial officer.

(1) [1931] A. C. 310, 327.

(2) [1931] A. C. 275.

(3) (1909) 8 C. L. R. 330, 357.

(4) [1931] A. C. 275, 296, 297.

(5) [1931] 2 Ch. 370.

(6) [1932] A. C. 392.

(7) [1931] 2 Ch. 370, 389.

(8) [1892] 1 Q. B. 431, 442.

(9) (1873) L. R. 8 Q. B. 255 ;

(1875) L. R. 7 H. L. 744.

(10) [1905] 1 K. B. 504.

(11) [1918] 2 K. B. 405.

(12) [1927] 2 K. B. 378.

Ronald Smith for the respondent. The question in this appeal is whether the commissioner, when the words were spoken, was acting in a capacity analogous to that of a judge. That depends upon the Act. Although under the Act the commissioner had functions which were administrative he also had judicial functions, and he was performing his judicial functions when the words were spoken. The distinction appears from a comparison of s. 16, which gave him power to investigate a business, and his powers under s. 22. When he is holding an inquiry s. 22 gives him power to summon witnesses and require production of documents, to administer oaths, and to punish by imprisonment disobedience to his orders in those matters. To ascertain the nature of the function performed by a commissioner when conducting an inquiry his powers must be considered. The possession of the above powers shows that he was, in the words of Lord Esher in *Royal Aquarium, etc., Ltd. v. Parkinson* (1), a tribunal having attributes similar to those of a court of justice. Further, he could commit a witness who refused to answer : *In re Singer*. (2) The power to punish by imprisonment conclusively shows that he was a tribunal similar to a court of justice : *Ex parte Fernandez* (3), *Groenvelt v. Burwell*. (4) Even if the decision in *Dawkins v. Lord Rokeby* (5) is not applicable, the reasons support the respondent's contention. *Barratt v. Kearns* (6) is not distinguishable.

[A reply was not called for.]

Nov. 8. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from a judgment of the Supreme Court of Canada affirming a judgment of the First Appellate Division of the Supreme Court of Ontario affirming a judgment of Orde J.

The original judgment was given on a motion by the defendant to dismiss the plaintiff's action for slander on the

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(1) [1892] 1 Q. B. 431, 442.

(4) (1698) Ray. (Ld.) 454, 467.

(2) [1929] S. C. R. 614.

(5) (1873) L. R. 8 Q. B. 255 ;

(3) (1861) 10 C. B. N. S. 3, 39. (1875) L. R. 7 H. L. 744.

(6) [1905] 1 K. B. 504.

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ground that it was frivolous and vexatious. The question is whether the defendant in uttering the words was protected by the absolute privilege which is given to words spoken by a judge. The statement of claim alleges that the plaintiff is a barrister-at-law of the Provinces of Ontario and Nova Scotia, and that the defendant published, concerning the plaintiff in relation to his profession and practice, to seven named persons the words following: "A very odious counsel. A lawyer cannot advise a wrong or a crime any more than anybody else. He has no privilege to do that. Well, then, you had full knowledge of the scheme. Was it you who gave to O'Connor the contrivance of effecting a crime without effecting a crime, of making a false pretence to the public and to the law? Was it you who gave that to O'Connor or did he give it to you? I will describe it more clearly. Did you give to O'Connor the idea that you might beat the law by false pretence? I say it is a thing any lawyer ought to be ashamed of. I do not care who he is. It is an outrageous, scandalous exhibition. It ought to be reported to the Law Society. Anybody who had an evil mind or disposition to commit crime would be completely carried away by the eloquence of Mr. O'Connor."

The defence admits that the words alleged were spoken except "it ought to be reported to the Law Society," and alleges that when speaking the words the defendant spoke them in his office of a commissioner appointed by the Governor-General in Council under the Combines Investigation Act, R. S. Can., c. 26, while he was acting judicially and that the speaking the said words was absolutely privileged.

The statement of claim did not allege the defendant's office: and it is obvious that the pleading could not be struck out as disclosing no cause of action. The plaintiff, however, on examination for discovery admitted that the words were spoken by the defendant while purporting to act under his commission. On that admission the motion in question was made and decided.

Their Lordships are of opinion that the words uttered were not protected by absolute privilege, and the order dismissing

the action should be set aside. The result will be that the action may come on for trial, and in these circumstances it is desirable that their Lordships should confine their opinion strictly to the matter in issue so as to avoid prejudicing the case of either party on a future occasion.

The law as to judicial privilege has in process of time developed. Originally it was intended for the protection of judges sitting in recognized courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doctrine has been extended to tribunals exercising functions equivalent to those of an established court of justice. In their Lordships' opinion the law on the subject was accurately stated by Lord Esher in *Royal Aquarium, etc., Ltd. v. Parkinson* (1), where he says that the privilege "applies wherever there is an authorized inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes. . . . This doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such Courts act."

The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which such courts act? This is of necessity a differentia which is not capable of very precise limitation. It is clear that the functions of some tribunals bring them near the line on one side or the other; and the final decision must be content with determining on which side of the line the tribunal stands. There must be remembered on the one hand the public policy which protects the independence of the judge; and on the other the public policy which requires that a citizen's reputation must be protected against false and malicious defamatory statements.

Has then a commissioner appointed under the Combines Investigation Act attributes similar to those of a court of justice; or does he act in a manner similar to that in which such courts act? In their Lordships' opinion the answer

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must be in the negative. Their Lordships had occasion recently to examine the provisions of the Act in question in *Proprietary Articles Trade Association v. Attorney-General for Canada* (1) and find it unnecessary to review in detail its provisions. The constitutional validity of the Act was in that case expressly impugned on the ground that it constituted an interference with the administration of justice. The Judicial Committee negatived that contention, and it seems clear from the judgment that they came to the conclusion that the sections dealing with the investigations by commissioners and others were merely administrative machinery for inquiring whether offences had been committed. It is only necessary to remember that the commissioner by the Act is empowered to enter premises and examine the books, papers and records of suspected persons to see how far his functions differ from those of a judge. His conclusion is expressed in a report ; it determines no rights, nor the guilt or innocence of any one. It does not even initiate any proceedings, which have to be left to the ordinary criminal procedure. While it is true that some tribunals charged with the duty of inquiry whether an offence or breach of duty has been committed have been held entitled to judicial immunity, such as a military court of inquiry (*Dawkins v. Lord Rokeby* (2)), or an investigation by an ecclesiastical commission (*Barratt v. Kearns* (3)), there were in those cases conditions as to the way in which the tribunal exercised its functions, and as to the effect of its decisions which led to the conclusion that such tribunals had attributes similar to those of a court of justice. On the other hand, the fact that a tribunal may be exercising merely administrative functions though in so doing it must act "judicially" is well established, and appears clearly from the *Royal Aquarium* case above cited. If it is exercising such functions it seems to be immaterial whether it is armed with the powers of a court of justice in summoning witnesses, administering oaths and punishing disobedience to its orders made for the purpose of effectuating its inquiries : see

(1) [1931] A. C. 310.

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(2) L. R. 8 Q. B. 255 ; L. R. 7

(3) [1905] 1 K. B. 504.

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Smith J., in the Supreme Court, found his view confirmed by the decision in the Court of Appeal in *Hearts of Oak Assurance Co. v. Attorney-General*. (2) That decision was reversed in the House of Lords (3) since the decision in the Supreme Court. That was a case of an inquiry by an inspector under statutory powers given by the Friendly Societies Act. It seems to their Lordships probable that if the learned judges of the Supreme Court had had the advantage of considering that decision and the statement therein of Lord Dunedin that such an inquiry was not a judicial proceeding, and that privilege in it would be qualified not absolute, they might have come to a different conclusion.

In the result their Lordships find themselves in agreement with the reasoning and decision of the late Hodgins J.A. in the Appellate Division of the Supreme Court of Ontario. The defendant in this case will be protected if he establishes that he spoke the words complained of on a privileged occasion, and the plaintiff fails to prove express malice. This is the measure of protection given to other administrative officers exercising similar duties, and their Lordships know of no legal principle which affords any further or better protection.

The appeal should be allowed, and the orders in the Court below discharged with costs ; and their Lordships will humbly advise His Majesty accordingly. The appellant must have his costs of the appeal.

Solicitors for appellant : *Bischoff, Cox, Bischoff & Thompson*.

Solicitors for respondent : *Blake & Redden*.

(1) [1931] A. C. 275.

(2) [1931] 2 Ch. 370.

(3) [1932] A. C. 392.

H. L. (E.)*

[HOUSE OF LORDS.]

¹⁹³⁴
July 19.

ELLIOTT (INSPECTOR OF TAXES) . . . APPELLANT ;

AND

BURN AND ANOTHER RESPONDENTS.

Revenue—Income Tax—“ Profits, ... arising from lands, tenements and hereditaments ”—Land taxed under No. 1 of Sch. A.—Annual payments by mineral owner to surface owner—Leave to let down surface—Easement—Hereditament—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. A, No. II, r. 7.

Annual payments were made by mine owners to the owner of the surface land under an agreement between the parties whereby the surface owner granted to the mine owners leave to let down the surface in consideration of the payments. The surface owners had been already taxed under No. I. of Sch. A on the annual value of the land :—

Held, that the annual payments were not taxable under r. 7, of No. II. of Sch. A, as “ profits arising from lands, tenements, hereditaments or heritages ” within the scope and operation of that rule.

Order of the Court of Appeal [1934] 1 K. B. 109 affirmed.

APPEAL from an order of the Court of Appeal. (1)

Messrs. J. H. and F. H. Burn were the owners of certain agricultural lands at North Follonsby, in the county of Durham. The minerals under these lands were owned by John Bowes and Partners, Ltd., a colliery company engaged in working the minerals. By an agreement dated December 19, 1906, and made between J. H. and F. H. Burn, hereinafter called “ the lessors,” of the one part and the colliery company of the other part, the lessors granted to the colliery company the surface liberties required for working the coal.

The surface of the land was let to a farmer at an annual rent of 296*l.*, upon which, as being the annual value of the land, the lessors were taxed under No. I. of Sch. A of the Income Tax Act, 1918.

By a further agreement dated December 21, 1922, and made between the lessors and the colliery company the lessors

* *Present* : LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD WRIGHT.

(1) [1934] 1 K. B. 109.

granted to the colliery company full liberty, in working any mines or seams of coal which the colliery company might for the time being be entitled to work under the lands of the lessors at North Follonsby aforesaid, to withdraw from the said lands or any part thereof any support for such lands whether vertical or lateral, subject to the provisions of the Railway Clauses Consolidation Act, 1845, in the case of parts of the land affected by that Act; and it was declared that nothing in the agreement should authorize the colliery company to cause any damage or injury to any adjacent lands or to any buildings, railways, works or erections on the adjacent lands whether belonging to the lessors or to any other person. By clause 6 the colliery company were to have the liberties granted by the agreement from May 1, 1922, till October 30, 1948.

The consideration for the grant was expressed in clauses 7 and 8 of the agreement in these terms:

Clause 7: "Yielding and paying therefor the yearly rent of 150*l.* and so in proportion for any less period than a year."

Clause 8: "And also yielding and paying the rent of 1½*d.* for every ton of coal worked by the lessees" (the colliery company) "from underneath the said lands hereinbefore described."

The question on this appeal arose in respect of these so-called rents—namely, the payments to be made under clauses 7 and 8.

It was also agreed by clauses 14, 15, 16, and 17 of the agreement that any actual damage caused to crops, drains, pipes, or other injury to the lands or to any buildings thereon should be compensated for in addition to the payment of "the said certain and tonnage rents" referred to in clauses 7 and 8 of the agreement. Also by clause 18 the lessors were indemnified against claims by third persons in respect of damage to adjoining lands. No such payments for actual damage were the subject matter of this appeal.

By a further agreement dated February 20, 1931, the term granted by the agreement of December 21, 1922, was extended to October 30, 1970.

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H. L. (E.) The amounts paid by the colliery company to the lessors in respect of "the said certain and tonnage rents" for the years ending on April 5, 1923 to 1929 inclusive were respectively 75*l.*, 155*l.*, 432*l.*, 526*l.*, 778*l.*, 288*l.* 16*s.*, and 694*l.* The lessors were assessed to income tax for the years ending on April 5, 1924, to 1930 inclusive upon the respective sums of 75*l.*, 155*l.*, 432*l.*, 526*l.*, 778*l.*, 288*l.* 16*s.*, and 694*l.* under Sch. D or alternatively for the years 1924-1925, 1925-1926, and 1926-1927 under Sch. A (1), and for the other years under Sch. D.

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The lessors appealed against these assessments. The Commissioners for the general purposes of the Income Tax Acts decided the appeal in favour of the lessors. At the request of the Inspector of Taxes the Commissioners stated a case for the opinion of the High Court. The special case was heard by Finlay J., who gave judgment for the Inspector of Taxes. (2) The lessors appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Lawrence and Slesser L.JJ.) reversed the judgment of Finlay J. and gave judgment for the lessors. (2)

The Inspector of Taxes appealed to this House.

1934. June 7. *Sir Thomas Inskip A.-G.* and *R. P. Hills* for the appellant. Income tax under Sch. A is to be charged "in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof." No. I. of Sch. A, the general rule for estimating the annual value of lands, tenements and hereditaments or heritages capable of actual occupation is in these words: "In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II. and No. III. of this Schedule), the annual value shall

(1) By s. 28 of the Finance Act, profits previously chargeable under 1926 (16 & 17 Geo. 5, c. 22), No. II. of Sch. A were transferred and Sch. III. to that Act all to Sch. D and Case III. thereof.

(2) [1934] 1 K. B. 109.

be understood to be:—(1.) The amount of the rent by the year at which they are let, if they are let at rackrent and the amount of that rent has been fixed by agreement." No. II. of Sch. A contains rules for estimating the annual value of certain lands, tenements and hereditaments or heritages which are not to be charged according to the preceding general rule. These rules relate to tithes in kind, dues and other payments of ecclesiastical origin, manorial and other royalties and payments and fines upon the demise of land. Rule 7 of No. II. relates to all other profits (with an immaterial exception) arising from lands, tenements and hereditaments and heritages not being in the actual possession or occupation of the person to be charged. In these cases the annual value is the average for one year of the profits of the number of years which appear to the Commissioners to be fair and the tax is to be charged on the receivers of these profits. No. III. contains rules for estimating the annual value of certain other lands, tenements, hereditaments or heritages not chargeable according to the preceding general rule.

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From these enactments it follows that the profits of lands, tenements and hereditaments include profits from tithes, manorial payments, fines upon the demise of land and inferentially from tolls. All these are included in the word "hereditaments" as used in the Income Tax Act, 1918. The payments in question in this appeal are the profits of an easement, a hereditament which falls naturally within the same class: *Hill v. Gregory*. (1) The easement consists of the right "to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it": *Rowbotham v. Wilson*. (2) That easement has been granted for a term of years in consideration of an annual payment, and the annual payments are profits arising from a hereditament within the meaning of r. 7 of No. II.

[The following cases were cited: *Dalton v. Angus* (3);

(1) [1912] 2 K. B. 61.

(2) (1860) 8 H. L. C. 348, 362.

(3) (1881) 6 App. Cas. 740.

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June 8. *A. M. Latter K.C.* and *J. Charlesworth* for the respondents. This is not like *Dalton v. Angus* (4), a case of a right of support to buildings acquired by user. That may be an easement and possibly a hereditament. The right to support, so far as it is material, in this case is the natural right incident to the ownership of land and part of the property in the land itself : *Backhouse v. Bonomi*. (5) The land has been taxed already under Sch. A, No. I. It is not to be taxed again : *Fry v. Salisbury House Estate, Ltd.* (6), especially when its value has been depreciated by the right conferred on the colliery company. Before the grant of that right the respondents' right of support existed neither as a separate tenement nor as a hereditament in any sense of the words. Since the grant it has become a right not of the respondents but of the colliery company. Except as part of their property in the land it was never the property of the respondents at all. The Crown contends that the grant of a right to let down the surface is like a grant of a right of way over the surface ; but both those rights are appurtenant not to the servient but to the dominant tenement and are naturally taken into account in the annual value of that tenement which is increased by them.

June 12. *Sir Thomas Inskip A.-G.* in reply. Annual payments are not exempt from taxation under Sch. A merely because they are really payments of capital. The owner and occupier of land may for his own profit create a taxable interest in another person. In that case the grantee may be taxable on account of the interest and the grantor on account of the profit.

The House took time for consideration.

(1) (1893) Note to *Beard v. 540*, sub nom. *Forth Conservancy Moira Colliery Co.* [1915] 1 Ch. *Board v. Commissioners of Inland Revenue*.
257, 268.

(2) [1905] 1 Ch. 460.

(4) 6 App. Cas. 740.

(3) [1929] A. C. 213 ; [1931] A. C.

(5) (1861) 9 H. L. C. 503.

(6) [1930] A. C. 432.

1934. July 19. LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal from an order of the Court of Appeal (Lord Hanworth M.R., and Lawrence and Slesser L.JJ.) dated July 7, 1933, allowing an appeal by the respondents from an order of the King's Bench Division (Finlay J.) dated January 31, 1933, whereby an appeal by the appellant upon a case stated by the Commissioners for the General Purposes of the Income Tax for the Chester Ward in the county of Durham was allowed and the decision of the Commissioners was reversed.

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The respondents are the owners of the surface of certain land at North Follonsby in the county of Durham. The minerals under the land are owned and worked by John Bowes and Partners, Ltd., hereinafter called the colliery company. The surface of the land has at all material times been let by the respondents to a farming tenant at a rack rent of 296*l.* On the basis of that rent as being under r. 1 of Sch. A the annual value of the lands, the tenant as occupier has been assessed to tax under that Schedule.

The claim on the part of the Crown, which has been rejected by the General Commissioners and by the Court of Appeal, is in respect of certain annual payments payable under an agreement dated December 21, 1922, between the respondents, thereafter called the lessors of the one part and the colliery company thereafter called the lessees of the other part.

The agreement contained recitals to the effect that the lessors claimed that the lessees were not entitled to work any of the mines under the lands or adjacent thereto in such a manner as to let down the surface of the lands, and that the lessees were liable to pay damages to the lessors for injury already caused to the lands by the letting down of the surface and it had been agreed that the lessors should grant to the lessees: "Liberty in working the said mines and seams of coal to let down such surface upon the terms hereinafter appearing." It was then witnessed that in pursuance of the said agreement and in consideration of the rent thereafter reserved and of the covenants by the lessees thereafter contained the lessors thereby demised unto the lessees:

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“(5.) Full liberty in working any mines or seams of coal which the lessees may for the time being be entitled to work under the said lands of the lessors at North Follonsby aforesaid (which lands are hereinafter referred to as ‘the said lands hereinbefore described’) to withdraw from the said lands hereinbefore described or any part thereof any support for such lands whether vertical or lateral but subject as to such parts of the lands hereinbefore described or any other lands as may be affected thereby or subject thereto, to the provisions of the Railway Clauses Consolidation Act, 1845, and it is expressly declared that nothing in these presents shall be deemed to authorize the lessees to cause any damage or injury to any lands adjacent to any of the said lands hereinbefore described or any buildings railways works or erections on such adjacent lands whether belonging to the lessors or to any other person.

“(6.) To hold the liberties granted unto the lessees from the 1st day of May, 1922, until the 30th day of October, 1948, provided the lease dated the 19th day of December, 1906, from the lessors to the lessees of surface liberties in connection with the lands hereinbefore described shall so long continue and subject and without prejudice to any rights of support to which any third party may now be entitled as the owner of any adjoining land.

“(7.) Yielding and paying therefor the yearly certain rent of 150*l.* and so in proportion for any less period than a year.

“(8.) And also yielding and paying yearly the rent of 1½*d.* for every ton of coal worked by the lessees from underneath the said lands hereinbefore described.”

There then followed clauses as to short workings and as to the details of the payment of the several rents and other matters not relevant to the construction of the clauses quoted above.

The agreement then contains clauses providing for the payment (Clause 14) to the lessors or their tenants of “full compensation for all damage which has already been caused or arisen or may hereafter be caused or arise by or in consequence of any letting down of the surface of such lands

to any drains, pipes, crops, stock cattle or other things for the time being thereon by reason or in consequence of any past or future underground operations of the lessees under the lands hereinbefore described or elsewhere whether the subsidences of such lands causing such damages arose previous to or after the commencement of any tenancy whether present or future of any of the said tenants." The rest of this clause need not be quoted for the present purpose.

Clause 15 however is important, it is as follows :—

"On the expiration or sooner determination of the said term or within any time within 3 years thereafter or if so required by the lessors at any time previous thereto to pay full compensation to the lessors for any injury which has already been caused or may hereafter be caused to any lands of the lessors by any past or future workings of the lessees whether under the lands hereinbefore demised or any adjoining lands."

The word "demised" must I think be a misprint or a clerical error for "described." No lands were "hereinbefore demised."

By a further "lease," dated February 20, 1931, between the same parties the term granted by the preceding instrument was extended to October 30, 1970.

I defer any remarks on the construction and effect of the instrument of December 21, 1922, until I have called attention to the material provisions of the Income Tax Act, 1918.

The charge of income tax is effected by s. 1 of the Act : "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits or gains respectively described or comprised in the Schedules marked A, B, C, D, and E contained in the First Schedule to this Act and in accordance with the rules respectively applicable to those Schedules."

The only Schedule which deals with the charge in respect of "property" as distinct from "profits or gains" is Sch. A, and that Schedule begins with the statement that "tax under Sch. A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the

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United Kingdom, for every twenty shillings of the annual value thereof." The point is that in order that the tax may be charged you must find something falling within the description of "lands, tenements, hereditaments, and heritages" capable of being the property of some person.

There follows a series of rules under numbers I., II. and III. directed to the estimation of the annual value of particular descriptions of lands, tenements and hereditaments, and in the case of No. II. for determining the person chargeable. No. I. applies to all lands, tenements, hereditaments or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II. and No. III. of the Schedule). The annual value is to be understood to be the rack rent at which they are actually let if there be one, or, if not let at a fixed rack rent, then the rack rent at which they are worth to be let by the year.

The main arguments in this House on both sides were devoted to the question whether the case falls within r. 7 of No. II. under Sch. A, and I accordingly propose to state as shortly as I can the terms and the effects of No. II. I do not forget that by s. 28 of the Finance Act, 1926, it is provided that income tax in respect of the property in the lands, tenements, hereditaments or heritages to which the rules of No. II. of Sch. A and in those to which the rules of No. III. of Sch. A apply shall cease to be chargeable under Sch. A and shall become chargeable under Sch. D, but it is common ground that this transfer does not affect the questions in issue in this appeal, and I propose therefore to deal with the matter as if this change had not been made.

No. II. is thus described: "Rules for estimating the annual value of certain lands, tenements, hereditaments or heritages which are not to be charged according to the preceding general rule, and for determining the person chargeable."

There follows a series of rules enumerating the hereditaments to which this general rule is to apply. The first three rules relate: (1.) to such hereditaments as tithes in kind; (2.) payments in right of the Church or by endowment or in

lieu of tithes and teinds in Scotland ; and (3.) tithes arising from lands if compounded for, and rents and other money payments in lieu of tithes arising from lands (except rent charges confirmed under the Tithe Act, 1836). By r. 4 these are all to be assessed and charged on the person entitled to the tithes or payments or his lessee or tenant, agent or factor. Rule 5 relates to manorial dues and casual profits. These are to be charged on the lord of the manor or the person renting the same. Rule 6 deals with fines received in consideration of a demise of lands or tenements and the tax is to be assessed and charged on the receiver of the fines with a proviso protecting fines applied as productive capital.

Putting aside r. 6, which stands by itself, it is a common feature of all the subjects of taxation mentioned in these rules that they are all properly called hereditaments or heritages, but as such they are separate from the land itself from which they arise and that land is not necessarily in the actual possession or occupation of the person to be charged.

I now come to r. 7 itself. It is in the following terms :—

“ In the case of all other profits not before enumerated (other than profits liable to deduction in pursuance of rules 1 and 4 of No. VIII. of this Schedule) arising from lands, tenements, hereditaments or heritages not being in the actual possession or occupation of the person to be charged, the annual value shall be understood to be the average amount for one year of the profits of the number of years which, on the statement of the person to be charged, appears to the commissioners to be fair and equitable. Tax shall be assessed and charged on the receivers of such profits or on the persons entitled thereto.” “ Profits liable to deduction in pursuance of Rules 1 and 4 of No. VIII.” are rents payable to a landlord from which the tenant occupier may deduct the tax paid by him and annuities payable by an owner of land from which he may deduct the tax relating thereto. This exception throws no light on the construction of the rule.

The Crown contends that the “ rents ” payable under the “ lease ” of December, 1922, are profits comprised in r. 7 of No. II. of Sch. A. In my opinion, before the Crown can

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H. L. (E.) succeed it must establish that such alleged profits arise from some hereditament not being the lands themselves the subject of taxation under Sch. A, for these last-mentioned lands are in the actual possession and occupation either of the owner or of his tenant. In a sense they arise from the right of support, for it is the possession of this right which enabled the respondents to obtain the payments in question. But it is now thoroughly well settled, and it is unnecessary to refer to specific authorities in support of the proposition, that the right of the surface owner to support of that surface by subjacent soil is not an easement, but is a natural incident to the land itself. If therefore the payments in question are to be regarded as arising from the right of support, they arise from the ownership of the land itself and would not come within r. 7, No. II., but within No. I. and would be covered by the assessment on the annual value under No. I.

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Then the Attorney-General insists that they should be treated as arising from the separate hereditament consisting of an easement alleged to be vested in the colliery company by virtue of the lease of 1922, the alleged easement being a right to let down the surface in the working of their mines without interference on the part of the surface owners. The answer to this seems to me to be twofold. In the first place, in my opinion, on the true construction of the lease no such right was in fact conferred upon the colliery company, and in the second place such a right, if conferred, would be a detriment to the owners of the surface, and I cannot see how sums of money received as the consideration for granting the right to inflict that detriment can be profits or gains arising to the owners of the surface from such right itself.

The first answer, however, requires further consideration. I need not repeat the terms of the lease which are sufficiently set forth above. The lease gives to the colliery company for a limited and uncertain period liberty, in working any subjacent coal which they were entitled to work, to withdraw from the lands of the respondents any support for such lands. This, I think, merely means that the respondents during the term will not seek either to recover damages for nuisance or

an injunction restraining the colliery company from committing such a nuisance, but there is no actual surrender of the right of support itself. That this is so is, I think, made plain by the provisions of clauses 14 and 15 as to compensation, for it is only on the assumption that the right of support continues to exist, though its immediate assertion may be controlled, that any claim to compensation could possibly arise.

On the whole then I am of opinion that the claim on the part of the Crown that the payments in question constitute profits arising from lands chargeable under Sch. A as being profits comprised in r. 7 of No. II. of Sch. A fails. In strictness this in terms only applies to the payments prior to 1927-28, but the same result follows as to the subsequent payments because it is common ground that the legal position is not altered by the transfer of the rule to Sch. D under the Act of 1926.

So far, if at all, as the payments represent a profit of the respondents, it comes to them in respect of their property in the lands themselves. Tax in respect of this property has been assessed on the annual value of the lands as ascertained under r. 1 and this assessment covers the present claim. It follows, on the authority of the *Salisbury House* case (1), that the Crown's alternative claim under Sch. D also fails.

In my opinion the appeal should be dismissed with costs.

My Lords, I am asked to say that my noble and learned friends Lord Blanesburgh and Lord Thankerton concur in this opinion.

LORD ATKIN. My Lords, I also agree.

LORD WRIGHT. My Lords, I also agree.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, July 19, 1934.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

(1) [1930] A. C. 432; 15 Tax Cas. 266.

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[HOUSE OF LORDS.]

1934
Nov. 23.

THE COMMISSIONERS OF INLAND } APPELLANTS ;
REVENUE }

AND

RAPHAEL AND OTHERS RESPONDENTS.

THE COMMISSIONERS OF INLAND } APPELLANTS ;
REVENUE }

AND

EZRA RESPONDENT.

Will—Settled share of residue—Direction that other property be settled on like trusts—Settlement—Recital of intention to comply with direction—Trust in default of Children—Construction—Non-compliance with direction—Forfeiture—Resulting Trust—Estate Duty paid in error—Claim to recover.

F. D. S. made his will in December, 1912. By clause 3 thereof he left a legacy to each daughter living at his death who should attain twenty-one; by clause 5 he left his residuary estate to such son of his as should be living at his death and attain twenty-one, and in default of any such son upon trust for such daughter as should be living at his death and attain twenty-one or marry under that age. By clause 7 he directed his trustees to retain the share of each child under clause 5 and the legacy under clause 3 of each daughter and to stand possessed thereof upon trusts for the benefit of the child and his or her children. If a child should not have any child who should attain a vested interest then the child's portion should, in the words of clause 7, "be dealt with as if such child had died in my lifetime without leaving any child living at my death." By clause 8, after reciting that his children might become entitled on his death to funds subject to the trusts of a certain settlement and a certain will, the testator willed and directed that each child of his should before the expiration of six months from his, the testator's, death by deed settle the interest in the funds subject to those trusts and make the settlement to the satisfaction of the testator's trustees and "so far as possible on the lines of the settlement contained in the last preceding clause hereof," with one permitted variation. The testator further directed that if such a child should be living at the period aforesaid and should not have executed such a settlement then his or her portion should be forfeited, and added the words, "and my will shall take effect

* *Present* : LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD WRIGHT.

in all respects as if he or she had died in my lifetime without leaving any issue living at my death."

The testator died on May 4, 1917. Within six months of that date the only son of the testator executed a deed of settlement. It recited that it had been prepared in order to give effect to the desire of the settlor to settle his interest in accordance with clause 8 of the testator's will, and that the testator's trustees were satisfied with it (as testified by their being parties thereto) and that it was as far as possible on the lines of the settlement contained in clause 7 of the testator's will. The settlement then in clause 5 provided that if the settlor should not have any child who should not attain a vested interest in the trust fund then the trust fund should be held as to one half as the settlor should appoint and subject thereto the fund should be dealt with "as if the settlor had died in the lifetime of the said F. D. S.," the testator:

Held, by Lord Warrington of Clyffe, Lord Atkin, Lord Thankerton, and Lord Wright (Lord Blanesburgh dissenting): (1.) that this settlement was not on the lines of the settlement in clause 7 of the testator's will and could not be construed so as to conform with the directions of that clause: *Mackenzie v. Duke of Devonshire* [1896] A. C. 400 followed and applied;

(2.) that the satisfaction of the trustees of the testator's will did not per se make the settlement a sufficient compliance with the testator's directions;

(3.) that there was consequently on November 5, 1917, a forfeiture of the settlor's interest in the residue of the testator's estate.

On the death of the settlor in 1924 estate duty had been paid by the testator's trustees in the belief that the testator's residuary estate passed on that event, and the rate of duty was computed on the same footing.

Held, by the majority of the House, that the trustees were entitled to recover the amount of the estate duty paid, the settlor having forfeited his interest in the estate before his death.

Orders of the Court of Appeal [1933] Ch. 858 affirmed.

APPEALS from orders of the Court of Appeal (1) affirming orders of the Chancery Division directing repayment by the Commissioners of Inland Revenue of 308,285*l.* 8*s.* 4*d.* paid in respect of estate duty on the death of the late Ronald Edward David Sassoon, who died on July 11, 1924.

The duties were assessed and paid in the belief that a direction contained in the will of the late Frederick David Sassoon, who died on May 4, 1917, the father of the said Ronald Edward David Sassoon, had been duly complied with. If this belief

(1) [1933] Ch. 858.

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H. L. (E.) was well founded the said R. E. D. Sassoon would have been the tenant for life of the residuary estate of F. D. Sassoon, which accordingly would have passed on the death of the said R. E. D. Sassoon.

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F. D. Sassoon (hereinafter called the testator), by his will dated December 18, 1912, appointed as his executors and trustees his wife Jeannette Sassoon, his brother-in-law Louis Edward Raphael, his nephew David Aaron Gubbay, and the said R. E. D. Sassoon. By clause 3 of the will he bequeathed to each daughter who should be living at his death and who should attain twenty-one years or marry under that age, that is, in the events which happened, to his daughter Muriel Helene, the wife of Alfred Ezra, and hereinafter called Mrs. Ezra, a legacy of 50,000*l.*, and by clause 5 he devised and bequeathed the residue of his estate to his trustees upon trust for such son of his as should be living at his death and should attain twenty-one—that is, in the events which happened, to his son R. E. D. Sassoon—and in default of any such son then upon trust for such daughter as should be living at his death and should attain twenty-one or marry if more than one in equal shares.

By clause 7 of his will the testator directed that his trustees should retain the share of each child under clause 5 and the legacy of each daughter under clause 3 and should stand possessed thereof upon the trusts declared in the sub-clauses (a) to (h) thereof, whereby each child was given a protected life interest subject to a discretionary trust, and each child's share was made subject to a power of appointment among the child's issue and a trust for the child's children with a hotchpot provision and a power of advancement to a limited extent. Sub-clause (f) provided that if a child of the testator should not have any child who should attain a vested interest in the child's portion, then, subject to the child's interest, the portion should be dealt with "as if such child had died in my lifetime without leaving any child living at my death."

Clause 8 of the will was as follows:—

"8. Whereas my children or some or one of them may under one or both of the following documents namely: my marriage

settlement dated the First day of October one thousand eight hundred and ninety four and the will of my father-in-law Edward Lewis Raphael become entitled under any appointment or in default of appointment on the death of either my wife or myself or partly in one event and partly in the other to interests in the funds subject to the trusts of those documents respectively Now for the protection and benefit of my children I will and direct as follows :—

“(a) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death or if he or she shall be under twenty-one at my death before the expiration of six calendar months after he or she shall attain twenty-one by deed settle the interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement or will or either of them and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one half of the capital fund settled and so that such settlement shall contain such powers and provisions as my trustees (other than those aforesaid) shall approve.

“(b) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death.

“(c) Provided always that the provisions of sub-clause (a) of this present clause contained shall not apply to any such interest as aforesaid of which any child of mine shall in my lifetime have made a settlement which as it stands at my death or as it is subsequently modified before the expiration of such period as aforesaid shall be satisfactory to my trustees

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“(d) Provided also that my trustees (other than as aforesaid) shall have power to waive the provisions of the said sub-clause to such an extent that they (other than as aforesaid) shall think fit in order to enable any son of mine to obtain money for the purpose of paying or discharging any debts liabilities or obligations whether legally binding or not incurred before my death and whether before he attains twenty-one or afterwards.”

The testator's will was proved on July 3, 1917, by Jeannette Sassoon and David Aaron Gubbay and R. E. D. Sassoon, the said L. E. Raphael having predeceased the testator. The testator's only children were R. E. D. Sassoon, who was born on November 8, 1895, and Mrs. Ezra, who at the testator's death was a spinster a little over twenty years of age.

On July 23, 1917, R. E. D. Sassoon, hereinafter called the settlor, executed a deed of settlement dealing with his interests under the testator's marriage settlement and the will of E. L. Raphael mentioned respectively in clause 8 of the testator's will, being interests in reversion expectant upon the death of his mother, Jeannette Sassoon. The deed of settlement was made between the settlor of the first part and Jeannette Sassoon and David Aaron Gubbay, therein and hereinafter called the will trustees, of the second part and the said David Aaron Gubbay and Cecil James Longcroft of the third part. It referred to clauses 3, 5, and 7 of the testator's will (therein called the Sassoon will) and fully recited the relevant provisions of clause 8 and continued as follows :—

“ And whereas in accordance with the provisions of the said clause 8 of the Sassoon will the settlor is now desirous of settling his interest whatever it may be . . . in all the property funds and moneys subject to the trusts of the settlement and of the Raphael will respectively . . . and whereas these presents have been prepared in order to give effect to the aforesaid desire of the settlor and contain such powers and provisions as the will trustees approve and the will trustees are satisfied

with the settlement herein contained and that it is so far as possible on the lines of the settlement contained in the said clause 7 of the Sassoon will so far as applicable with the modification mentioned in sub-clause (a) of the said clause 8 and such approval and satisfaction is testified by the will trustees being parties to and executing these presents." The testatum was expressed to be "in pursuance of the said desire and for the consideration hereinbefore appearing," and witnessed that the settlor assigned all his interest under the marriage settlement of F. D. Sassoon and the will of E. L. Raphael (but subject to the life interest therein of Jeannette Sassoon) to the said David Aaron Gubbay and Cecil James Longcroft upon the trusts and subject to the powers and provisions concerning the same contained in the clauses of the settlement numbered 2 to 6.

Clause 5 of the settlement was in the following terms:—

"5. If the settlor shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest in the trust fund then subject to the trusts and powers herein contained in favour of the settlor and his issue the trust fund and all accumulations (if any) of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be held as to one half thereof in trust for such person or persons or purposes as the settlor shall by will or codicil appoint and as to the other half part and in default of and until and subject to any appointment also as to the first mentioned half shall be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

The settlor possessed property of his own in addition to that to which he was entitled under the will of the testator.

The settlor died on July 11, 1924, a bachelor and intestate, leaving him surviving his sister Mrs. Ezra, the respondent in the second appeal, his sole next of kin, to whom letters of administration of his estate had been granted.

Mrs. Ezra on attaining the age of twenty-one had executed

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At the date of the settlor's death, estate duty amounting to 280,169*l.* 10*s.* 4*d.* was claimed from the trustees of the will of the testator on the footing that his residuary trust estate passed on the settlor's death; and that sum, together with 5772*l.* 4*s.* 9*d.* interest, in all 285,941*l.* 15*s.* 1*d.*, was paid out of that estate and accepted in respect of estate duty.

Doubts having arisen as to the true meaning of clause 5 of the settlement of July 23, 1917, an originating summons was taken out in the Chancery Division of the High Court of Justice by two of the trustees of that settlement, the other trustees being among the defendants to the summons, to have it determined whether upon the true construction of the settlement and in the events which had happened the property comprised therein was held on trust for Mrs. Ezra as legal personal representative of the settlor, or otherwise to have determined the trusts upon which the property was held. The originating summons was heard before Luxmoore J. on October 14, 1930. The learned judge held on the principle of *Lassence v. Tierney* (1) that the property comprised in the settlement of July 23, 1917, was the settlor's own property; that the settlor meant to follow the direction in his father's will and to provide that if no child of his should attain a vested interest in the property it should be dealt with as if it had belonged to the testator and he, the settlor, had died in the testator's lifetime; but that the settlor had failed to make that provision, and had in fact given rise to a resulting trust in his own favour; and that he had thereby forfeited his interest in the residue of the estate of the testator, which therefore did not pass on the death of the settlor, but had passed to the settlor's personal representative, Mrs. Ezra.

After the order of Luxmoore J. had been made the trustees of the testator's will, taking the view that the settlement was not, on its true construction, a compliance with the condition contained in clause 8 of the testator's will, and that the settlor

(1) (1849) 1 Mac. & G. 551.

had therefore forfeited as from November 5, 1917 (the day following the expiration of six months from the testator's death), all his interest under the testator's will, and that the 285,941*l.* 15*s.* 1*d.* paid in respect of estate duty on the settlor's death was not legally exigible, applied to the Commissioners of Inland Revenue for repayment of the duty. The Commissioners rejected the claim. The appropriate formalities having been observed, the trustees filed in the department of the King's Remembrancer a petition of appeal to the High Court and served it upon the Commissioners.

The second appeal raised, *mutatis mutandis*, the same question.

Mrs. Ezra was, as above stated, the sister and the sole next of kin of R. E. D. Sassoon, the above named settlor. On his death letters of administration of his estate were granted to Mrs. Ezra. Estate duty on his estate at the rate of 32 per cent., and amounting to 78,526*l.* 13*s.* 1*d.*, was claimed from and paid by Mrs. Ezra. This sum was computed on the footing that the estate of the settlor included (1.) a sum of 11,300*l.*, the amount of dividends and interest on investments comprised in the residuary estate of F. D. Sassoon, the above named testator, and also (2.), for the purposes of aggregation and in order to ascertain the rate of duty, the value of the residuary estate of the testator as computed at the date of the settlor's death.

After the order of Luxmoore J., mentioned above, Mrs. Ezra took the view that the settlement made by the settlor was not, on its true construction, a compliance with the conditions contained in clause 8 of the testator's will; with the following consequences: (1.) that the settlor therefore forfeited as from November 5, 1917 (the day after six months from the testator's death had passed), all interest under the will of the testator; (2.) that no part of the dividends and interest arising from the testator's estate ought to have been included in the settlor's estate, which, apart from them, amounted to 234,095*l.* 16*s.* 1*d.*; (3.) that the rate of estate duty payable by her was 24 per cent. and not 32 per cent., and the amount properly payable was 56,182*l.* 19*s.* 10*d.* She therefore claimed the difference between 78,526*l.* 13*s.* 1*d.*,

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H. L. (E.) the amount paid, and 56,182*l.* 19*s.* 10*d.*, the amount properly payable, namely 22,343*l.* 13*s.* 3*d.* and interest thereon. The Commissioners of Inland Revenue rejected the claim, and Mrs. Ezra filed the petition which is the subject of the second appeal.

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The two petitions were transferred to the Chancery Division and heard before Farwell J. The learned judge held that the petitioners were entitled to recover so much of the duty as had been paid on the mistaken supposition that the estate of the testator passed on the death of the settlor, and ordered that the Commissioners of Inland Revenue should repay to the trustees of the testator's will the sum of 285,941*l.* 15*s.* 1*d.* and to Mrs. Ezra the sum of 22,343*l.* 13*s.* 3*d.*

The Commissioners appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Lawrence and Romer L.JJ.) affirmed the decision of Farwell J. and dismissed the appeal. (1)

The Commissioners of Inland Revenue appealed to this House.

1934. June 15. *Sir Thomas Inskip A.-G., Fergus D. Morton K.C., and J. H. Stamp* for the appellants. There can be no doubt as to what the settlor, R. E. D. Sassoon, meant to do and believed he was doing. He meant to make a settlement as far as possible on the lines of the settlement in his father's will so as to prevent the forfeiture which was to follow if the direction in the will was not followed. This purpose may be effected by substituting for the words "The trust fund . . . shall be dealt with as if the settlor had died in the lifetime," etc., or the words "The trust fund . . . shall be dealt with as the settlor's portion under the will would be dealt with if the settlor had died in the lifetime," etc., or "The trust fund . . . shall be dealt with as if it had been subject to the trusts declared by clause 7 of the will of Frederick David Sassoon and the settlor had died in the lifetime," etc. The words actually used are only a condensed means of expressing the intention of the substitutions suggested. As they stand,

and taken literally, the words "The trust fund . . . shall be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon" would operate to create a forfeiture of the settlor's interest six months after the death of the testator. "Benigne faciendae sunt interpretationes chartarum ut res magis valeat quam pereat," and "judges ought to be curious and subtle" (astuti) "to invent reasons and means to make acts effective according to the just intent of the parties": *Roe v. Tranmarr*. (1) See also *Langston v. Langston* (2), where in a will the words "second, third and other sons" were held to include an eldest son: *Beaumont v. Marquis of Salisbury* (3), where a deed limiting an estate to trustees and their heirs to preserve contingent remainders was held to pass an estate pur autre vie and no greater estate. See also *Walsh v. Trevanion* (4); *Gwyn v. Neath Canal Co.* (5); *In re Daniel's Settlement Trusts* (6), where in a post-nuptial settlement the words "child or children who being a son or sons," etc., were held to include daughters, a subsequent clause enabling the trustees to apply the income of the presumptive share of every such child "towards his or her maintenance and education": *In re Akeroyd's Settlement* (7), where in a marriage settlement the words "after the decease of the wife and husband" were construed to include the case of the husband's becoming a liquidating debtor. Lindley L.J. in the Court of Appeal said (8): "The intention is plain; but by a piece of bad drafting the draftsman has failed to give full effect to that plain intention . . . but that particular kind of flaw does not require a suit to rectify the instrument."

Secondly, the testator has indicated the degree to which the settlement is to conform to the provisions of the will, namely that degree which shall satisfy his trustees; and the trustees have declared their satisfaction with the settlement.

June 22. *Wilfrid Greene K.C., Gavin Simonds K.C., A. Andrewes-Uthwatt and A. T. Macmillan* for the respondents in

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(1) (1758) Willes, 682, 684.

(2) (1834) 2 Cl. & F. 194.

(3) (1854) 19 Beav. 198.

(4) (1850) 15 Q. B. 733.

(5) (1868) L. R. 3 Ex. 209, 215.

(6) (1875) 1 Ch. D. 375.

(7) [1893] 3 Ch. 363.

(8) Ibid. 367.

H. L. (E.) both appeals. The principle upon which the Court of equity and this House act in questions of construction is well settled. If the operative part of a deed is ambiguous, the ambiguity may be resolved by having recourse to other parts of the instrument, the recitals or what has been called the narrative portion. If there is no ambiguity in the operative part that part in its natural and ordinary import must override any doubts which may be raised by other portions of the deed ; it can only be corrected or amended by a suit for rectification. If the only ambiguity in the operative part is one which is suggested by the recitals, that is not an ambiguity which will induce the Court or this House to give the operative part as it stands any other than its natural meaning : *Rickman v. Carstairs*, per Lord Denman C.J. (1) ; *Grey v. Pearson*, per Lord Wensleydale (2) ; *Ex parte Walton. In re Levy*, per Jessel M.R. (3) ; *Ex parte Dawes. In re Moon* (4) ; *Orr v. Mitchell* (5) ; *Mackenzie v. Duke of Devonshire* (6), per Lord Halsbury (7) ; Lord Watson (8) ; Lord Davey. (9) The operative part of this settlement is couched in unambiguous terms. If construed according to the plain meaning of the words used it has no legal effect, as the objects of the trust are insufficiently defined. Consequently there is a resulting trust in favour of the settlor, and the settlement is not a settlement so far as possible on the lines of the settlement contained in the will of the testator.

June 25. *F. D. Morton K.C.* replied.

June 26. *Wilfrid Greene K.C.* was heard in rejoinder upon cases newly cited in reply.

[The following cases were also referred to : *Clayton v. Earl of Glengall* (10) ; *Young v. Smith* (11) ; *Pugh v. Drew* (12) ; *In re Tredwell* (13) ; *In re Ethel and Mitchells and Butler's Contract* (14).]

- (1) (1833) 5 B. & Ad. 651, 663.
- (2) (1857) 6 H. L. C. 61, 106.
- (3) (1881) 17 Ch. D. 746, 751.
- (4) (1886) 17 Q. B. D. 275, 286.
- (5) [1893] A. C. 238, 245.
- (6) [1896] A. C. 400, 405.
- (7) Ibid. 406.

- (8) [1896] A. C. 407.
- (9) Ibid. 408.
- (10) (1841) 1 Dr. & W. 14.
- (11) (1865) L. R. 1 Eq. 180.
- (12) (1869) 17 W. R. 988.
- (13) [1891] 2 Ch. 640.
- (14) [1901] 1 Ch. 945.

The House took time for consideration.

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1934. Nov. 23. LORD BLANESBURGH. My Lords, these are appeals by the Commissioners of Inland Revenue from orders of the Court of Appeal, dated April 11, 1933, affirming orders of the Chancery Division of the High Court of Justice (Farwell J.) dated November 30, 1932. By these orders repayment is directed to the respondents of sums amounting in all to 308,285*l.* 8*s.* 4*d.* in respect of estate duty paid in the months of October and December, 1924, and April, 1925, upon the death on June 11, 1924, of Ronald Edward David Sassoon. He was the only son of Frederick David Sassoon, who had died on May 4, 1917, and under whose will, dated December 18, 1912, he was largely interested. It will be convenient in what follows to refer to the son as Ronald and to the father as the testator. The circumstances in which the claim for repayment of this duty is now made are unusual, possibly unique. Summarily stated they are as follows:—

The testator had, by his will in the event which happened, bequeathed to Ronald, in settlement, his residuary personal estate. On Ronald's death, a bachelor and intestate, letters of administration to his estate were granted to his only sister, the respondent, Mrs. Ezra, as his sole next of kin.

The payment of the estate duty now sought to be recovered was made on Ronald's death without hesitation or question. It was made in part by the trustees of the testator's will, and in part by Mrs. Ezra, as Ronald's legal personal representative. Ronald had during his life been in undisputed enjoyment of the residuary estate of the testator, and there was apparently no room for doubt that that estate passed again upon his death. On the same footing Ronald's own property was ascertained and taken to by Mrs. Ezra as his legal personal representative and sole next of kin, and estate duty paid, and thereafter for another six years, on the basis that Ronald's interest had under the terms of the will passed in settlement to Mrs. Ezra for life with remainder to her children, the residuary estate of the testator continued to be administered by his trustees.

Then, for the first time, the question was raised whether

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Ronald retained at the time of his death any interest whatever in the testator's residuary estate ; whether indeed his entire interest therein had not been lost by forfeiture six months after the testator's death for that he had failed within that time to make such a settlement of certain property to which he was entitled under his parents' marriage settlement and his maternal grandfather's will, as, on pain of forfeiture in case of default, was required of him by the testator's will. A settlement of that property purporting on its face to be a complete compliance with the conditions imposed upon Ronald in that behalf, and to which the testator's other trustees were also parties, had on July 23, 1917, been executed by him. But apparently in 1930 it struck some diligent student of its provisions that, notwithstanding all appearance to the contrary, it failed to be the effective instrument for its purpose that by all parties it had been both intended and supposed to be, and the doubt was raised whether, on its true construction taken in connection with the terms of the conditions imposed upon Ronald by the will, the settlement was really effective to save the forfeiture. If Ronald's interest in residue had in fact been lost so long before his death as November 14, 1917, there would, or might, be a right to recover the large sum of estate duty paid upon the footing that his interest continued until his death, and, in the events which had happened, and with that possibility in view, it was to the direct interest of Mrs. Ezra, as Ronald's sole next of kin, although not, it would seem, to the direct interest of her children, to set up that case and, as his legal personal representative, to assert that his interest, notwithstanding that he had continued to enjoy it during his life, had been actually forfeited long before his death.

Any such action called for some courage, because in all certainty the suggestion, had it been made in his lifetime, would, doubtless with some heat, have been repudiated by Ronald himself. But the will trustees, although Ronald's settlement had had the full approval of their predecessors, lent their aid, and the unusual situation has resulted that the forfeiture of Ronald's interest, which he must himself have

strenuously resisted, is in these proceedings being asserted by those who represent his estate, while the Commissioners of Inland Revenue, perhaps for the first time in history, appear as the champions of the dispossessed. These facts, however, are only relevant in this, that the Court leans against forfeiture, and it must be more and not less vigilant for principle in a case in which the normal positions of parties with reference to the forfeiture here alleged are so completely reversed.

In order to have the question thus raised settled, at least in part, a friendly summons was taken out to ascertain the true construction of Ronald's settlement from the forfeiture point of view, and on that summons Luxmoore J. placed upon the settlement a construction which, on the view of the will of the testator now taken below, would show the settlement to have been ineffective to prevent a forfeiture. And if the settlement be thus ineffective it is agreed that the respondents' present claims for the recovery of these estate duties must succeed.

But the Crown was not a party to the proceedings before Luxmoore J., and, although Farwell J. in this litigation considered it to be bound thereby, that position is no longer maintained by the respondents. They agree that the whole question as to the true construction and effect of Ronald's settlement is still and now open. Mr. Morton and Mr. Stamp accordingly contended here for the Commissioners that, irrespective of its actual provisions, Ronald's settlement was, on the true construction of the testator's will, a sufficient compliance with the conditions thereby imposed. They contended further that properly construed the settlement was in all respects and on any construction of his will a complete compliance with the conditions to avoid forfeiture imposed by the testator.

These two questions of interpretation are essentially distinct; the first depends mainly upon the true construction of one of the clauses of the will; the second upon the true construction of Ronald's settlement. They are both of them questions of nicety, and have by the Courts below been determined in the respondents' favour: one, the first of them,

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H. L. (E.) by Farwell J., the second by Luxmoore J., and both by the Court of Appeal.

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The questions can, I think, only be answered after a critical examination of the will and the settlement, and I fear that I must, if only for convenience of reference, set forth in some detail sundry provisions of both instruments. Assuming, however, as perhaps I may, that your Lordships are in possession of the facts of the case generally, I will endeavour to confine my citations to those provisions only which have a direct influence upon the conclusions at which I have arrived.

By his will the testator appointed his wife, his brother-in-law, Louis Edward Raphael, his nephew, David Aaron Gubbay, and Ronald, if he attained twenty-one, to be his executors and trustees. Ronald had attained twenty-one at the testator's death.

By clause 3 of his will the testator gave to each daughter who should be living at his death and should attain twenty-one or marry, a legacy of 50,000*l.* Mrs. Ezra, his only daughter, an infant at his death, in due course became entitled to this legacy. The bequest of the testator's residuary estate to his trustees was made by clause 5, and, confined to the event which happened of his having only one son and one daughter living at his death, was in these words: "Upon trust for such son . . . of mine as shall be living at my death and shall attain twenty-one. . . . And in default of any such son upon trust for such daughter . . . of mine as shall be living at my death and shall attain twenty-one or marry under that age." Then the testator, by clause 7, directed that his trustees should retain the share of each of his children under clause 5, and the legacy to each daughter under clause 3 upon a series of trusts contained in sub-clauses which, ultimately of first importance on the second question, may conveniently be summarized now.

By sub-clauses (a) and (b) each child is given a protected life interest in his or her share, and the income of the share is made subject to a discretionary trust, should the life interest determine in the child's lifetime. By sub-clauses (c), (d) and (e) each child's share is made subject to a power of appointment

among the child's issue, and there is a trust for the child's children in default of appointment with a hotchpot provision and a power of advancement in favour of issue limited to one quarter of each share.

Sub-clause (f) must be emphasized. It is in its phraseology of significant importance upon the issues now raised.

Its terms are as follows: "If a child of mine shall not have any child who under the trust in default of appointment herein-before contained shall attain a vested interest then" his or her portion "shall be dealt with as if such child had died in my lifetime without leaving any child living at my death." It will be found that the exact transcription of these words appearing in Ronald's settlement is the provision thereof which has originated the main difficulty in this case. As applied to Ronald's settled share under the will the effect of the words, assuming no forfeiture, was on Ronald's death unmarried to carry that share to Mrs. Ezra and her children, as an accretion to her own settled legacy, the testator's residuary dispositions having, in effect, to be read as if Ronald had never been born.

Sub-clauses (g) and (h) need not here be specially detailed.

Clause 8 of the will which immediately follows may be termed the forfeiture clause. It is now set forth in full.

"Whereas my children or some or one of them may under one or both of the following documents namely: my marriage settlement . . . and the will of my father-in-law Edward Lewis Raphael become entitled under any appointment or in default of appointment on the death of either my wife or myself or partly in the one event and partly in the other to interests in the funds subject to the trusts of these documents respectively Now for the protection and benefit of my children I will and direct as follows:—

"(a) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death or if he or she shall be under twenty-one at my death before the expiration of six calendar months after he or she shall attain twenty-one by deed settle the interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in

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H. L. (E.) possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement and will or either of them and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one half of the capital fund settled and so that such settlement shall contain such powers and provisions as my trustees (other than those as aforesaid) shall approve.

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“(b) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death.

“(c) Provided always that the provisions of sub-clause (a) of this present clause contained shall not apply to any such interest as aforesaid of which any child of mine shall in my lifetime have made a settlement which as it stands at my death or as it is subsequently modified before the expiration of such period as aforesaid shall be satisfactory to my trustees (other than as aforesaid) or which such child cannot for any reason satisfactory to my trustees other than as aforesaid modify as aforesaid.

“(d) Provided also that my trustees (other than as aforesaid) shall have power to waive the provisions of the said sub-clause to such an extent that they (other than as aforesaid) shall think fit in order to enable any son of mine to obtain money for the purpose of paying or discharging any debts liabilities or obligations whether legally binding or not incurred before my death and whether before he attains twenty-one or afterwards.”

Now, my Lords, it is upon that clause, in its true meaning, that the answer to the first question before the House depends. Was a settlement in due time made by Ronald to the satisfaction of the other will trustees a compliance of itself with the conditions thereby imposed? Alternatively, were

these will trustees, themselves satisfied with the settlement actually made, to be the judges whether that settlement was "so far as possible on the lines of the settlement contained" in clause 7 of the will "so far as applicable" or had Ronald's settlement to be one which objectively answered that description irrespective of the trustees' satisfaction with its terms? These in substance are the questions for determination.

And the material for their consideration is complete when to the above clause of the will there are added the two last recitals taken from Ronald's settlement as actually executed. These are also directly relevant on the second question of interpretation raised by this appeal; and will again be referred to in that connection. They are as follows:—

"And whereas in accordance with the provisions" of clause 8 of the will of the testator "the settlor" Ronald "is now desirous of settling his interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in all the property funds and moneys subject to the trusts of the settlement and the Raphael will respectively. . . .

"And whereas these presents have been prepared in order to give effect to the aforesaid desire of the settlor and contain such powers and provisions as the will trustees approve and the will trustees are satisfied with the settlement herein contained and that it is so far as possible on the lines of the settlement contained in the said clause 7 of the [testator's] will so far as applicable . . . and such approval and satisfaction is testified by the will trustees being parties to and executing these presents."

Before proceeding to examine the forfeiture clause of the will as a whole in the light of these recitals in the settlement I would again emphasize the form of words in which the consequences of forfeiture are described in sub-clause (b): "My will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death"; once more, with the substitution of "issue" for "child," the very words used in clause 7 (f) of the will and in

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I proceed now to examine the will and in particular the forfeiture clause 8 already quoted. The Courts below, as has been stated, have placed upon the requirements of that clause a construction which makes the dispositive provisions of Ronald's settlement, as they interpret these, completely ineffective to save the forfeiture of his interests under the will. Is their construction of this clause justified? That is the first question.

In your Lordships' House that question has been discussed with an elaboration which perhaps for the first time critically tests not only the correctness, but the basis in that regard of the orders appealed from. As a result it has gained a new prominence, entitling it, at your Lordships' hands, to a consideration which it has not perhaps so far received. If the contentions to which attention must now be directed are well founded the appeals must succeed without more. Accordingly, while it would always have been logical, it has become convenient also, to deal with this forfeiture clause at once.

That the clause is well drawn no one will dare to affirm. Interpretation is necessary if its true meaning is to appear. Its principal sub-clause (a) in particular is both clumsily and carelessly framed, and it must be the first task of construction to bring its provisions into harmony, if at all possible, with other sub-clauses less ambiguous in expression.

In the accomplishment of this task the nature of the clause as a whole and the class of instrument in which it is found are not to be disregarded. Indeed they assist construction, for clause 8, a forfeiture clause, is contained in a will. As a forfeiture clause it is strictissimi juris to be approached with a leaning against forfeiture in the construction of any phrase or provision of doubtful import. As a clause in a will its words are, in aid of the intent, more easily moulded, so as to be susceptible of construction, than are those of a deed. These well authenticated principles are in sharp contrast with those governing

the construction of Ronald's settlement with which the other branch of the appeal is concerned. Romer L.J., in his judgment, speaking of that deed, says that the principles of construction applicable require that the true meaning of the words employed "should be ascertained without reference to the question of the consequences that the use of such words may have upon the dispositions contained in the will" of the testator.

That doubtless is so, subject always to the terms of the settlement itself. But the statement has no application to the forfeiture clause of the will, and it is noticeable that the learned judges below have apparently construed that clause uninfluenced either by its special character or by the nature of the instrument in which it is discovered. In the result and not even, it is said, under any compelling necessity of language, they have attributed to it an effect which, while opening at its widest the door to a forfeiture of Ronald's settled interest, has done nothing for the cause of harmonious construction.

The call for such a construction of the clause and the objections taken to the construction so far adopted will be very pointedly disclosed by a preliminary survey of its provisions with regard to two things: the position of the testator's trustees under it; and separately, their position with reference to any child's settlement executed before the testator's death.

As to the first of these, it is not, I think, possible to draw from a perusal of the whole clause any other than the clear conclusion that a final responsibility in all matters committed to them in relation to a child's settlement is thereby laid upon the testator's disinterested trustees. His selection of trustees strikes me as specially significant in this connection. Their close relationship to himself at least suggests a belief on his part in their full sympathy with the aim of the clause—namely, to tie up in the hands of his descendants as much family property and for as long a period as possible. One trustee, as has been seen, was the testator's widow; the second, who, however, died in his lifetime, was his brother-in-law; the third was his nephew and the fourth was Ronald. But close relationship was not a sufficient qualification for this special duty. It might

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H. L. (E.) not be proof against self-interest. A settlor, accordingly, although for other purposes a trustee, was not to share the trustees' responsibilities under clause 8—a definite exclusion emphasized by its repetition no less than five times in the four sub-sections of the clause. And the importance—may it not be said the last importance?—in the testator's eyes of the responsibilities resting on his independent trustees is further emphasized by the fact that to secure their discharge, in the case particularly of a child of age at his death, he goes so far as to risk that child's ability to comply with the clause at all. For a settlement avoiding a forfeiture which had to satisfy the independent trustees had to be executed within six months of the testator's death. What if probate were not obtained for more than these six months? What if it were renounced altogether and administration with the will annexed were granted to a stranger? These risks of futility were not run for nothing. It is difficult to believe that they would have been run at all if the expression of satisfaction on the part of these trusted relatives when required and given was not to have effect.

And in the case of a child's settlement executed before the testator's death and referred to in sub-clause (c) the trustees' expressed satisfaction is final, irrespective of the actual provisions of the deed and even if it remained revocable at the testator's death. The contrary of this is not suggested by any of the learned judges, and was not contended for in this House. But, does it not follow that language free of all ambiguity will alone justify a construction of the clause which, in the case of settlements under sub-clause (a) and, in no way relevantly distinguishable, would in like circumstances, and while still requiring it to be expressed, deprive the trustees' satisfaction of any effectiveness at all? I suggest that any legitimate interpretation of that sub-clause producing in this respect uniformity with sub-clause (c) is to be preferred to one which in the normal case of a child's settlement, executed after the testator's death, would reduce to an empty ceremony, in any instance where that satisfaction was essential, the expressed satisfaction of his independent trustees.

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It is now convenient to state in detail, for it is at length possible intelligibly to canvass the construction placed upon clause 8 in the Courts below. In the view of the learned judges, the clause requires that the following conditions must be observed if a forfeiture is to be avoided :—

A. In a case under sub-clause (c) the settlement must be satisfactory to the independent trustees. But,

B. In the case of a settlement under sub-clause (a) : (1.) It must be to the satisfaction of the independent trustees ; and (2.) It must be so far as possible with stated modifications on the lines of the settlement contained in clause 7 of the will so far as applicable ; and (3.) It must contain such powers and provisions as the independent trustees shall approve. In this statement I refer, of course, only to those conditions with reference to which questions have been raised in this case.

Now, my Lords, the construction of the clause so adopted results in this, that for a settlement, even a revocable settlement under sub-clause (c), to be effective the satisfaction of the trustees is sufficient, while for the effectiveness of a settlement under sub-clause (a) the trustees' satisfaction, of itself quite ineffective unless the other conditions are complied with, is nevertheless required to a settlement whose provisions are detailed in condition 2, and to one moreover which is by condition 3 to contain also "such powers and provisions as my trustees other than those (*sic*) as aforesaid shall approve." In other words the trustees' expression of satisfaction with a child's settlement under sub-clause (a), so far from being final as in the case of one under sub-clause (c) has, while always still essential, become gratuitous when both of the other conditions are fulfilled, and ineffectual if either of them is unfulfilled.

And this construction so open to criticism has been adopted on purely grammatical grounds. The learned judges have made no reference to any contradictions or redundancies attending it, and they have not thought it necessary to consider the claims of any alternative construction as a result of which the forfeiture of Ronald's interests would at once be

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H. L. (E.) avoided and the various provisions of the clause would remain consistent. They have in effect reached their conclusion merely by supplying as words to be understood in sub-clause (a) those which I now enclose in square brackets. "Each child of mine shall by deed settle the interest and [each child] shall make such settlement to the satisfaction of my trustees [and each child shall make such settlement] so far as possible on the lines, etc.," then construing the whole clause literally. The question now is whether the suggested words, or words of similar import, are either the only words or, in the context and circumstances, are the words most proper to be understood. After very careful consideration I have come to the conclusion that they are neither, and I now feel satisfied, on the form of the sub-clause itself, as well as with a view to harmonize the provisions of the clause as a whole, that the words best to be supplied may be such words as (I again include them in square brackets) "and [so that it is] so far as possible on the lines", etc.

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Now, as is shown by the recital in Ronald's settlement already set forth, this is the construction of the clause on which the trustees acted. Is it not justifiable even grammatically? My Lords, I think it is. There is no invincible grammatical objection to the implication of these words, and the result of implying them is to bring harmony into the whole, at least in every essential respect, and to remove from a testamentary forfeiture clause a contradiction not capable, and a want of effectiveness not easy, of rational explanation. For the provisions of the sub-clause which immediately follow then become provisions to be required, it is true, by the trustees, but provisions with which it is they who are to be satisfied. Their satisfaction is to be the touchstone of effectiveness for a settlement under sub-clause (a) just as it is for one under sub-clause (c). And this construction is enough in the present case to save the forfeiture of Ronald's interests under the will.

Farwell J. found the strongest argument against this view in the fact that the testator "thought it necessary to state the one modification which he was prepared to allow, that is

the general power of appointment over half the fund in the event of there being no children." I cannot myself think this difficulty to be serious. It does not seem to touch the construction suggested. Moreover to the effectiveness of a settlement with this modification omitted no objection could have been raised. For it is a mere power, which could have been effectually released by the settlor the moment after the settlement was executed.

My Lords, being satisfied that this view of the sub-clause is permissible, and that, if permissible, it is for this testamentary forfeiture clause obligatory, I need not express any concluded opinion upon the question whether a complete solution of all difficulty may not here properly be found by reading the words of this ill-drawn clause "*and* so far as possible" as if they were "*or* so far as possible." Farwell J. refers to this solution as a possibility, but he rejects it as inadmissible. He does not however allude to the difficulties which its adoption would remove.

Now, it must of course be agreed that this substitution of the disjunctive for the conjunctive is not lightly to be made even in the construction of a clause like this in a will where so much latitude in aid of intent is allowed. And if the views be correct which I have already expressed as to the permissible meaning of its words, as they stand, no resort to this solution is essential. But if these views are not tenable and if the only proper construction of this clause as it stands is that adopted below, then I would hesitate long before I declared myself precluded in the cause of harmonious construction from here reading the word "*or*" for the word "*and*."

It is a substitution which in the case of a will has been often made by Courts of construction to remove contradiction or redundancy. In the present case it would eliminate both, and its effect in each direction would be as complete as it would be convincing. For, with the substitution made, harmony full toned and not merely partial, results and the clause as a whole has attributed to it an effect corresponding to that which is to me at least its plain intention, as disclosed by the considerations to which reference has been made in this

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H. L. (E.) judgment. A settlement whether under sub-clause (c) or sub-clause (a) becomes completely effective to avoid a forfeiture if framed to the satisfaction of the independent trustees. But a settlement under (a) will also be equally effective if it complies with the conditions 2 and 3 already stated—the intervention of the trustees on that alternative being confined, as is rational, to their approval referred to in the third condition. As a result in no case is the expressed satisfaction of the trustees without effect when as a condition of effectiveness it is required. Nor is it ever gratuitously required where the terms of the settlement are objectively prescribed and the trustees must approve of its powers and provisions. I need not say more. My judgment on this forfeiture clause alone would be for the Crown.

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But I must not leave unconsidered the second question arising on the appeal, which is concerned with the true construction of the words of Ronald's settlement prescribing the manner in which, in the event of his death without issue, the fund thereby settled is to be dealt with. These words, already referred to, are to be found in section 5 of the settlement. I will deal with them textually after I have adverted to such of the recitals and other provisions of the deed as may have a bearing upon the effect to be attributed to them. The recitals are copious but selective. They strike a reader as being all there for some relevant purpose. It is made clear, for example, that neither under his parents' marriage settlement nor under the Raphael will—the two sources of the trust fund—did Ronald's interest in default of appointment vest during infancy, and he must, it appears, have been at least nine years old at his grandfather Mr. Raphael's death—facts, under the very eye of the draftsman, going far to absolve him in advance from the suggestion to be later dealt with of a serious confusion of thought on his part. Again in the recitals of the testator's will the interests of daughters under clauses 3 and 5 are quoted with direct reference to their position under the latter clause, while clause 7 is recited with as full a reference to a daughter's position thereunder as to a son's—indications going to show,

as was suggested on behalf of the Crown, that these recitals are framed so as properly to introduce a section 5 which would reserve to daughters some potential interest in the trust fund and not one, such as the respondents contend for, which excludes daughters in every event from any participation at all. Then, there is a complete recital of the forfeiture clause 8 of the will and, in the words already quoted, a statement of the consequences to the settlor of non-compliance with its provisions. Finally there are the two last recitals already set forth in another connection. To these I invite your Lordships' attention afresh as possessing an influence all their own on the solution of the question now under consideration. It is, however, for the moment enough to say that the narrative upon which the operative provisions of the settlement proceed makes it plain that the only occasion for the settlement was to save the forfeiture of Ronald's interests under the testator's will, that with a view thereto both the trustees and he had set out to comply in the fullest sense with the conditions detailed in the forfeiture clause, and that by the terms of the settlement as executed they were satisfied that they had done so. It is, I suggest, beyond argument that any permissible construction of the operative provisions which would fulfil these recitals, is to be preferred to one, however otherwise plausible, which would defeat them.

And it is agreed on all hands that apart from the difficulty created by the wording of section 5 the recited satisfaction of the trustees was fully justified. The operative sections follow in their order the corresponding sub-clauses of clause 7 of the will. In the case of every section, other than section 5, the correspondence is effected by a substantive or direct disposition of the trust fund by words which, with necessary modification required by the changed circumstances, are a translation of the effect in the same event of the words of the opposite sub-clause of clause 7. Every one of these sections might accurately be prefaced by the words from the final recital "following the lines of the settlement as contained in the [corresponding] sub-section of clause 7 of the testator's will." This is true of sections 2, 3, 4, and 6—sections both preceding

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H. L. (E.) and following section 5. That section, however, the final dispositive clause, makes a new departure. There, the direct method of disposition is abandoned in favour of one that is referential, as will be seen by this citation of its relevant provisions :—

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5. " If the settlor shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest in the trust fund then the trust fund shall be held as to one half thereof in trust for such person or persons or purposes as the settlor shall by will or codicil appoint and as to the other half part shall be dealt with as if the settlor had died in the lifetime of the [testator] without leaving any child living at the death of the said [testator]."

In this referential disposition, the words of reference—whatever their effect—are, as has been already noted, the very words of clause 7 (f) of the will by which in the same event the ultimate destination of the settled fund thereunder is directed.

Now, if it can be accepted—and the contrary is not suggested in any quarter—that it was the purpose of the draftsman—whether attained or not is another matter—to follow the lines of the will settlement in this as in the other dispositive sections of Ronald's settlement, his change in this section from the direct to the referential method of disposition is not difficult to account for. The task of translating accurately this provision of the will and transferring the result to section 5 of the settlement was not too simple. The provisions of clause 7 (f) are themselves referential: and their precise effect, clear enough now, is not immediately obvious. So the draftsman in this instance, over anxious perhaps, seems to have aimed at a disposition which, in the event, would make the destination of the trust fund the counterpart, in every particular, of the destination of the will fund in the same event. By this expedient any risk of inaccurate translation would be avoided. And such in the submission of the Crown is, on its true construction, the exact effect of section 5.

In the respondents' submission, however, this construction is not admissible. The words used will not, they say, permit of it. These cannot be treated otherwise than as words of disposition of the trust fund itself, and not the less so, that when so treated they become completely ineffective as words of disposition and must in construction be either ignored or regarded as struck out of the clause, with the result that the trust fund in the event is by the settlement undisposed of and results to the settlor.

With the issue of construction thus sharply defined, the first, and for me the only, question to be answered is whether, on the words of the section as it stands, there ensues the result for which the appellants contend.

This question, strangely enough, turns upon the true effect of two small words, of themselves, to all appearances, relatively unimportant—the words “as if.” These words, as is pointed out by Romer L.J., are elliptical, some words between them are left out. What are these words? The Lord Justice says they must be either (1.) “As the trust fund would have been dealt with if”: or, (2.) “As the settlor's portion under the will would have been dealt with if.” In this I agree with him subject to one slight modification which, however, may not be without some importance. I would phrase the alternatives thus: Either (1.) “As the trust fund would be dealt with if: or (2.) As the settlor's portion under the will would be dealt with if. . . .”

Now Romer L.J. was not prepared to say more for the second alternative than that it was arguable, and his impression clearly enough was that the first was preferable to it. But he did not pause to justify this preference and, apart from it altogether, and for a reason which he gives, he excluded the second alternative even from consideration. This alternative, he says (1), “need not be further considered, as it would lead to nothing. For if the settlor had died in the lifetime of his father without children, he would never have had a portion at all; and the settlement of which he is following the lines would not have existed. In these circumstances it must be the trust fund itself that becomes

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H. L. (E.) the subject-matter of the inquiry how it would have been dealt with upon the hypothesis referred to. Now, unfortunately, this inquiry cannot be answered."

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I do not know whether that deliverance of the Lord Justice was to any extent induced by the paulo-post form in which he framed his alternative ellipses. It may be that if these had been framed in the future, as I have suggested they ought to be, his conclusion on this point would have been different. But however the two alternatives are, in this respect, couched, I very respectfully suggest that the reasons adduced by the Lord Justice for rejecting the second out of hand cannot be justified. For myself, I am unable to appreciate them.

The hypothetical words in clause 7 (f) of the will are found in a settlement directed by that clause which, so far as Ronald was concerned, became operative because in fact he survived the testator. The hypothesis is inserted in the sub-clause (f) merely to be the basis upon which, in the event, and according to the terms of the will, the ultimate destination of the fund would be ascertained. And this hypothetical event, upon Ronald's actual death, no forfeiture being then suspected, did prove effective, as has been seen, to carry in terms of the will the enjoyment of Ronald's settled share to Mrs. Ezra and her children. Why should not the trust fund in the same event be validly directed to the same destination? In my judgment it is not possible, for any such reason as that adduced, to rule out the second alternative, certainly not in the form in which I have phrased it. The question whether the first alternative or the second is that which is proper to be adopted is, of course, another matter altogether.

Now, my Lords, on this it must, I think, be conceded that the words of the section, merely as words, lead more easily to the acceptance of the first alternative than of the second. The projection into the void of the "trust fund" just mentioned seems as a matter of first impression fully to satisfy what is required. But applying Lord Macnaghten's observations in *Orr v. Mitchell* (1) to the effect that where words are susceptible of two constructions the context may

(1) [1893] A. C. 238, 254.

properly be referred to for the purpose of determining which of the two constructions is the true meaning—a rule which applies even though one of the two meanings is the more obvious and would necessarily be preferred if no light could be derived from the rest of the deed—applying, I say, these observations, it becomes clear that in the present instance something more than a superficial reading of the section itself is required before the choice between the two alternatives can be definitely made. That is to say, it must be ascertained which of them will best fulfil or realize the recited purpose of the settlement: which of them will best accord with the recital that that purpose has been in fact achieved by the settlement. Again if following sections 2, 3, 4 and 6 there may be implied before the words “be held” in this section, as I think there may, the preface “following the lines of the settlement in clause 7 (f) of the said will as modified by clause 8 (g),” it must be asked which alternative will verify that statement? These are the questions which must be put: and to each of them there is only one answer—the second alternative. By the adoption of the first with its consequential resulting trust to the settlor every recited purpose of the settlement is frustrated: the dispositive words become meaningless and completely ineffective: the recital of its actual effect is contradicted: the implied words of preface are falsified. By the adoption of the second alternative every purpose of the settlement is attained: every recital of effect is verified: every word of preface is fulfilled. So far as section 5 is concerned, Ronald’s settlement is one “on the lines” of the will settlement, not only “so far as possible” but exactly: not merely “so far as applicable” but completely. For these reasons I reach the conclusion that as a matter almost of necessary implication the second alternative is really the only alternative to be adopted. So soon as it is recognized that the words “as if” are elliptical, it lies as open to be chosen by a Court of construction as does the first. When it has been chosen the case of the Crown is complete.

In this view of section 5 an argument adduced in support of

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H. L. (E.) the first alternative construction is deprived of much of the importance which it assumed at the hearing. The final justification for the adoption of the first alternative, it was urged, was that the section was the work of a draftsman who had blundered in failing to recognize that the destination of the trust fund by reference to the words of clause 7 (f) of the will would be quite different from the destination of the settled will fund directed by these same words—an obvious blunder, but one sufficient to fix the sense in which the words were actually used in the section.

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My Lords, if the construction which I have placed on section 5 be correct no such blunder is attributable to the draftsman, but speaking for myself I could not, in any circumstances, have accepted that explanation of the wording of the section. It is to me almost inconceivable that a conveyancer of the disclosed calibre of the draftsman of this otherwise well drawn settlement could have made such a blunder. Its extent is almost infinite. It implies, first of all, that to him the words of clause 7 (f) were words of disposition of the settled will fund easily converted into words of disposition of Ronald's own trust fund. But the words were not in the will words of disposition at all: they are not a disposition of any property of Ronald's: it was quite irrelevant to their effect whether he died testate or intestate, married or single. All that was necessary was that the hypothesis should be that of an event which, if it happened, would without more suffice to extinguish Ronald's interest in the testator's residuary estate, and leave that estate free to be dealt with in accordance with the will as if he had never lived. But if such a mistake could be imputed to this draftsman—a sufficiently damaging imputation—what of the further suggestion that he supposed that these words might be utilized so as to become original words of disposition of the trust fund? As to this, it will be remembered first of all that by the date of the settlement the hypothesis of the will that Ronald dead should have left no issue living at the testator's death had ceased to be a hypothesis. There had in fact been no such issue. The only

rational hypothesis thereafter applicable to the trust fund must have been restricted to that of Ronald's death in the testator's lifetime. But is it to be supposed that this conveyancer believed that even the full hypothesis as expressed could of itself carry the trust fund in any definite direction and in particular in the direction required by the forfeiture clause? This seems to me impossible. The hypothesis put was satisfied by Ronald's death at any time prior to the death of the testator. But for nine years of that period Ronald had, as is clear from the draftsman's own recitals, no interest whatever under the Raphael will, while he had during his twenty-one years of minority no interest under either will or settlement which as part of his estate could pass on his death to anybody. All of which really goes to confirm the view that what I have called the first alternative construction of section 5 leads to a complete absurdity, to be rejected out of hand if one more sensible is open. All of it shows also, as I suggest, that the mistake the draftsman made, if such it can properly be called, was not of the extravagant kind so far suggested, but consisted only in a failure to intimate clearly that in that final dispositive section 5 the direct method of disposition employed in the earlier sections had been abandoned and the referential method of achieving the recited object of the settlement and satisfying the implied introductory words of the section had been adopted in its place. In other words the elliptical words of the second alternative ought if only for clearness' sake to have been expressed. It was rash to leave them to the working even of a necessary implication. Had the draftsman been less reserved in this matter the complete satisfaction with the settlement, as I believe well justified, which continued for thirteen years would have remained permanently undisturbed.

My Lords, all this is pure construction. In no proper sense is any addition to the wording of the settlement called for, and if the meaning which I have placed upon section 5 be tenable there is, as I have said, no further question, and I must not in a judgment, already too long, proceed to discuss the problem which does not for me arise, whether, if the first alternative construction

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of the section is alone possible, the second cannot be restored by introducing into the section words to produce its effect. Upon that question while I might say much I will only say this. Here we have a case which in one respect most material differs from, I think, all of those in which a similar difficulty has arisen. In these the choice has usually been between leaving dispositive words to operate according to their natural signification and supplying words to vary that meaning. Here the choice lies between on the one hand supplying words in order to give some dispositive effect to words which are clearly intended to be words of disposition and, on the other hand, treating these words as if they had no existence at all. In this case, not one side only, but both sides do violence to the actual terms of the deed. But there is this difference between them. The respondents by the omission of some words which are there would defeat its manifest intention; the appellants by the insertion of some few words which are not there would secure the fulfilment of the declared purpose of the settlement. Which alternative is a Court of construction to choose?

I leave the question there.

For the other reasons already given, I would on this second question also allow the appeal.

LORD WARRINGTON OF CLYFFE (read by LORD THANKERTON). My Lords, these are appeals by the Commissioners of Inland Revenue from orders of the Court of Appeal (Lord Hanworth M.R. and Lawrence and Romer L.JJ.) dated April 11, 1933, affirming orders of the Chancery Division of the High Court of Justice (Farwell J.) dated November 30, 1932, ordering repayment to the respondents of sums amounting in all to 308,285*l.* 8*s.* 4*d.* in respect of the estate duty paid in the months of October and December, 1924, and April and June, 1925, on the death of Ronald Edward David Sassoon (hereinafter referred to as Ronald), who died on July 11, 1924.

Both appeals raise the same question—namely, whether upon the true construction of a settlement of certain funds of his own made by Ronald in pursuance of directions in that behalf contained in the will of his father, Frederick David Sassoon

(hereinafter called the testator), the result was to create in Ronald a resulting trust in his favour and, in consequence, to cause a forfeiture of his interest in the testator's estate under his the testator's will.

This question has been answered by the Courts below in the affirmative and the Commissioners of Inland Revenue appeal.

Before proceeding further it will be convenient to state certain facts relating to the testator and his family with the relevant dates.

The testator died on May 4, 1917, leaving him surviving his widow, Jeannette Sassoon, and two children, Ronald, and the respondent, Muriel Helene Ezra, then a spinster and a minor of the age of twenty or thereabouts.

His will was dated December 28, 1912, and was proved on July 3, 1917.

Ronald died on July 11, 1924, a bachelor and intestate, leaving him surviving his sister, the said Muriel Helene Ezra, his sole next of kin, to whom letters of administration of his estate were granted in due course.

On attaining the age of twenty-one Muriel Helene Ezra executed a settlement of her funds referred to in the testator's will in all material respects identical with that made by Ronald. She has two children, Ruth Muriel Ezra and Aline Mozelle Ezra, respectively, infants and spinsters.

By his will (clause 3) the testator (in the events which have happened) gave to his daughter Mrs. Ezra a legacy of 50,000*l.* and (clause 5) he gave, devised and bequeathed to his trustees all the remainder of his property whatsoever and wheresoever upon trust in the events which have happened for Ronald.

He then directed (clause 7) that his trustees should retain the share (if any) of each child under clause 5 and the legacy under clause 3 of each daughter and should stand possessed thereof and any accumulations of income and the investments representing the same (all thereafter included in the description of such child's portion) and the income thereof upon the trusts and subject to the power and provisions following so far as applicable thereto.

It is unnecessary to state the whole of these trusts in detail ;

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it is enough to say that (sub-clauses (a) and (b)) he gave each child what is commonly called a protected life interest, and (sub-clause (c)) after the death of such child his or her share was to be in trust for his or her issue as he or she should by deed or will appoint, and in default of appointment for his children who should attain the age of twenty-one years or being female should marry under that age and if more than one in equal shares. Sub-clause (d), a hotchpot clause, and sub-clause (e), an advancement clause, are both in common form. He then proceeded as follows (sub-clause (f)) : " If a child of mine shall not have any child who under the trust in default of appointment herein contained shall attain a vested interest in his or her portion, then subject to the trusts and powers hereinbefore contained in favour of such child and his or her issue, such portion and all accumulations (if any) of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be dealt with as if such child had died in my lifetime without leaving any child living at my death."

Sub-clauses (g) and (h) are not material for the present purpose.

By clause 8, after stating that his children respectively might under his own marriage settlement and the will of his father-in-law, Edward Lewis Raphael, become entitled to interests in the funds, subject to the trusts of those documents respectively, he proceeded as follows : " Now for the protection and benefit of my children I will and direct as follows :—(a) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death or, if he or she shall be under twenty-one at my death, before the expiration of six calendar months after he or she shall attain twenty-one by deed settle the interest, whatever it may be, and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement and will or either of them, and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the

lines of the settlement contained in the last preceding clause hereof so far as applicable but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one-half of the capital fund settled, and so that such settlement shall contain such powers and provisions as my trustees (other than those as aforesaid) shall approve.

“(b) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without having any issue living at my death.

“(c) Provided always that the provisions of sub-clause (a) of this present clause contained shall not apply to any such interest as aforesaid of which any child of mine shall in my lifetime have made a settlement which as it stands at my death or as it is subsequently modified before the expiration of such period as aforesaid shall be satisfactory to my trustees (other than as aforesaid) or which such child cannot for any reason satisfactory to my trustees (other than as aforesaid) modify as aforesaid.” Sub-clause (d) gives power to his trustees (other than as aforesaid) to waive the provisions of sub-clause (a) to enable a son to obtain money for payment of debts, liabilities or obligations incurred before his (the testator's) death.

Ronald's settlement was dated July 23, 1917, and was made between himself (thereinafter called “the settlor”) of the first part, Jeannette Sassoon and David Gubbay (thereinafter called “the will trustees”) of the second part, and the said David Gubbay and Cecil James Longcroft (thereinafter called “the original trustees”) of the third part. It contained recitals indicating the interests Ronald took under his father's and mother's marriage settlement and under the will of Louis Edward Raphael. It also contained a recital of parts of the will of Frederick David Sassoon showing the gift to the settlor of his portion and the direction contained in clause 7 for the retention of his children's portions upon the trusts

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H. L. (E.) in the said will contained. Clause 8, sub-clauses (a) and (b), are recited in full. After further statements not necessary to be here repeated the deed contains the following recital :
 “ And whereas in accordance with the provisions of clause 8 of the Sassoon will the settlor is now desirous of settling his interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in all the property funds and moneys subject to the trusts of the settlement and the Raphael will respectively. . . . And whereas these presents have been prepared in order to give effect to the aforesaid desire of the settlor and contain such powers and provisions as the will trustees approve and the will trustees are satisfied with the settlement herein contained and that it is so far as possible on the lines of the settlement contained in clause 7 of the Sassoon will so far as applicable with the modification mentioned in sub-clause (a) of the said clause 8 and such approval and satisfaction is testified by the will trustees being parties to and executing these presents.”

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By the operative part of the deed “ in pursuance of the said desire ” the settlor assigned his interests under the settlement and the Raphael will respectively in the widest terms to the original trustees upon usual trusts to get in receive or obtain transfer thereof or the investments representing the same with common form directions for reinvestment and so forth and a direction to stand possessed of the premises thereinbefore assigned and the investments for the time being representing the same (all thereafter referred to as “ the Trust Fund ”) and the income thereof upon the trusts and subject to the powers and provisions thereafter contained concerning the same. The deed then reproduces textually the provisions of clause 7 of the testator’s will so far as they refer to the settlor, his children, and issue, including the hotchpot and advancement clauses. Then follows clause 5 reproducing clause 5 (b) of the testator’s will. This must be set out in full :

“ If the settlor shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest in the trust fund then subject to the trusts and

powers herein contained in favour of the settlor and his issue the trust fund and all accumulations (if any) of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be held as to one-half thereof in trust for such person or persons or purposes as the settlor shall by will or codicil appoint and as to the other half part and in default of and until and subject to any appointment also as to the first mentioned half shall be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

This is the provision which has caused the trouble. The draftsman obviously thought that by reproducing the words of the testator's will he was fulfilling his task, but he omitted to notice that in the will those words referred to the son's portion, whereas in the settlement he was preparing they referred to the trust fund, and that trusts and provisions applicable to the former were not applicable to the latter. It was an unfortunate blunder, and the principal question for decision is whether it can be set right by construction, as the appellants maintain, or whether, as has been decided in the Courts below, the only possible remedy, if there be one, would be rectification.

Before dealing with this question, however, I will dispose of another contention on the part of the appellants which, if successful, would render discussion of it unnecessary. The appellants contend that on the true construction of clause 8 of the testator's will the "satisfaction" of the trustees is conclusive, and that having been expressed by them the sufficiency of Ronald's settlement cannot be questioned. I am unable to accept this view. In my opinion the main direction of the testator is that the settlement he directs shall be so far as possible on the lines of the settlement contained in clause 7 of his will so far as applicable with the particular modification specified, and he has required the satisfaction of the trustees merely as a further assurance that the settlement actually made is of that nature. I think this view is further borne out by the fact that in sub-clause (a), which applies to a

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possible settlement already existing, he has given a real discretion to the trustees, which contrasts strongly with the provision in sub-clause (a) connected as it is with the precise directions in regard to the nature of the settlement. The "powers and provisions" as to which the approval of the trustees is sufficient are, in my opinion, administrative powers and provisions usually inserted in such instruments, and are just those which would naturally be left to the discretion of the trustees.

It will be noticed that the trustees express themselves satisfied that the settlement is so far as possible on the lines of the settlement contained in clause 7 of the Sassoon will, so far as applicable with the special modification above mentioned, thus recognizing, as I think, the nature of the duty cast upon them. Unfortunately they were ill advised, but the mistake on their part, or rather on the part of their advisers, cannot in my opinion override the express directions of the testator.

I now come to the question, argued on behalf of the appellants with much ingenuity and force, whether the words in the operative part of the deed are capable as a matter of construction of being controlled and modified so as to give effect to the intention of the settlor declared by the recitals, the terms of which are quoted above.

The principle of law in this respect is perfectly settled and it may be thought unnecessary to restate it or to refer to authority on such a point. But in deference to the arguments addressed to the House I will cite the opinions of certain noble and learned Lords, expressed in the case of *Mackenzie v. Duke of Devonshire*. (1) In that case an attempt was made, similar to that made by the appellants, to modify as a matter of construction clear and unambiguous words in the operative part by reference to the intention of the settlor as expressed in the narrative part of the deed. Lord Halsbury said (2): "If the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those

(1) [1896] A. C. 400.

(2) [1896] A. C. 405.

words, and the purposes of the trust so set forth, can be in any way controlled, qualified, or modified by the initial statement of what the motive of the author of the deed was. It would to my mind be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made." Lord Watson in the same case said (1): "The narrative words come to no more than this; 'My intention is to do' so and so, and you may add this, 'and I have accomplished that purpose by the provisions which follow.' In such a case the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction." Lord Davey said (2): "I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention."

The fact is that the narrative and operative parts of a deed perform quite different functions, and "intention" in reference to the narrative and the same word in reference to the operative parts respectively bear quite different significations. As appearing in the narrative part it means "purpose." In considering the intention of the operative part the word means significance or import—"The way in which anything is to be understood" (Oxford English Dictionary) supported by the illustration: "The intention of the passage was sufficiently clear."

To apply these principles to the present case: "The trust fund shall be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

(1) [1896] A. C. 407.

(2) [1896] A. C. 408.

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In themselves the words are clear and unambiguous. They involve a single hypothesis only—namely, the death of the settlor under the circumstances supposed. But as applied to the trust fund there cannot be found any directions as to how on the hypothesis mentioned it is to be dealt with. The result is a resulting trust for the settlor and the forfeiture of his interest in the “portion” bequeathed to him by the testator.

The contention on the part of the appellants inevitably involves the introduction of a second hypothesis in addition to that contained in the actual words. That this is so is admitted by the appellants, and they have suggested many formulae which they say would effect their purpose. They all involve the introduction of a second hypothesis. It would be waste of time to consider them all; they are merely variations on the same theme. I will take one as an illustration: “As if the trust fund had been property held by the trustees upon the same trusts as those declared by clauses 5 to 7 inclusive of the will of Frederick David Sassoon and the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon.”

For the reasons stated above it is in my opinion impossible without departing from the settled principle mentioned above to thus alter the words of the clause in question.

Very many cases were cited on behalf of the appellants. I do not refer to them, for they are merely illustrations of what has been done under other circumstances. The principle of law is settled and the duty of the Courts is to act in accordance therewith. In the present case I am of opinion that the Courts below have arrived at the correct conclusion and that this appeal should be dismissed with costs.

LORD THANKERTON. My Lords, for my own part I desire to express my full concurrence in the opinion about to be delivered by my noble and learned friend Lord Wright, which I have had the privilege of considering.

LORD WRIGHT. My Lords, my noble and learned friend

Lord Atkin desires me to say that he has read in print my opinion, which I am now about to deliver, and agrees with it. H. L. (E.)

The questions in this appeal involve the construction of certain provisions in the will dated December 18, 1912, of Frederick David Sassoon, whom I shall call the testator, and the construction and effect of certain provisions in a settlement dated July 23, 1917, made by the testator's son, Ronald Edward David Sassoon, whom I shall call Ronald Sassoon. The parties to the present dispute are on the one hand the appellants, the Commissioners of Inland Revenue, and on the other the trustees of the testator's will and the administratrix of Ronald Sassoon. The question is whether Ronald Sassoon had forfeited his interest under the testator's will, so that it was not property passing on his death: if it was not, the death duties paid on the basis that it was are admittedly recoverable from the appellants. I need not recapitulate the facts or the documents.

It is on clause 5 of Ronald Sassoon's settlement that the issue mainly turns. The respondents contend that it is far from being a settlement on the lines as far as possible of the testator's will in the assumed event, because its effect is to create a resulting trust in favour of Ronald Sassoon, instead of creating the limitation which in the assumed event would come into effect under the corresponding provision of the testator's will, which would be, in substance, a limitation in favour of Mrs. Ezra and her issue or in default of her issue, a resulting trust in favour of the testator. The appellants contend that the clause is a compliance with the conditions of the testator's will, partly because it was to the satisfaction of the trustees under that will, and secondly and alternatively that in its true construction it was as far as possible on the lines of the settlement, either in its literal construction or as it should be understood with such words as by necessary implication must be read in to give effect to the intention expressed in the recitals, which was to achieve as far as possible the same limitations as those which would in the assumed event take effect under the testator's will.

Each limb of this argument needs to be separately considered.

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H. L. (E.) The questions must be dealt with simply as questions of construction. The appellants are not in any event parties who could claim rectification: the administratrix does not claim rectification. Indeed her case is that there was a forfeiture.

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The first contention which the appellants advance, is based on the words of clause 8 of the testator's will: it is not disputed that the settlement, under clause 5, was to the satisfaction of the trustees of the testator's will; indeed it is so recited. The question is whether such satisfaction is conclusive that the settlement is as far as possible on the lines of the testator's will settlement or whether the latter is a separate condition, superadded to the trustees' satisfaction.

In my judgment the question must be answered in favour of the respondents, as it has been in the Courts below. The appellants' contention cannot, I think, be made to fit in with the actual words of the clause, which appear to me to be only susceptible of the meaning for which the respondents contend. To achieve the meaning for which the appellants contend, some paraphrase or substitution appears to be unavoidable: thus in place of "and" must be read some such words as "that it is": or it might have been "and to the satisfaction of the trustees that" etc. Without some paraphrase, I find it impossible to read the second requirement as merely directory or as merely an indication to the trustees of what they ought to look for; I think it is a peremptory direction to "each child of mine" defining the lines on which he is to make his settlement. In fact there are three requirements in the three sentences in clause 8: (i.) to the satisfaction, etc., (ii.) and so far as possible, etc., (iii.) and so that such settlement, etc. Whatever their relative importance may be, they are textually put on the same level and are all conditions to be severally complied with. I cannot follow the argument that, if the trustees are honestly satisfied, the matter is concluded and the condition fulfilled. Nor can I agree that the trustees have been, as it were, empowered to make a bargain with Ronald Sassoon as to what settlement he should make, or that it is a sort of precatory trust, so that if the trustees of the will

are satisfied nothing more is required. On the contrary, I think it is a governing term of the settlement that it is to be as far as possible on the lines of the settlement in the will. No doubt the testator wanted to secure that substantially the whole property should remain in the family, save in so far as he had specifically provided to the contrary, as in respect of the child's power of appointment over one-half of the capital fund, and in respect of the special permission that there might be a settlement on other lines if made before his death, and in respect of the further proviso that in regard to some part of the fund the trustees might waive the condition in order to discharge the testator's son's debts and liabilities incurred before the testator's death. These permitted variations show clearly that except where they apply, it is a condition of the will that Ronald Sassoon should settle the fund as far as possible on the lines of the settlement in the will. This is further confirmed by the use throughout of the word "shall." I cannot find anything unreasonable in the condition. There seems to be no insuperable difficulty (or there would not have been but for the peculiar terms of Ronald Sassoon's settlement) in finding the required dispositions, which it is to be observed are to be "as far as possible on the lines," etc. A reasonable latitude is allowed. Nor can I feel any difficulty even if the satisfaction of the trustees is on this view pointless. Even if it were, though I do not think it is, that would not change the construction of the words: the testator may simply have required that the trustees should be satisfied that there was a settlement and that its terms were such as they could fairly approve. But their satisfaction cannot, on the true construction of the will, dispense with the binding force of the other condition.

The question then arises whether that condition has been broken by the terms of clause 5 of Ronald Sassoon's settlement, so that a forfeiture has occurred. On this the argument on behalf of the appellants has fallen, as already stated, under two heads. That argument has been that on the literal words of clause 5 read with the settlement as a whole there is a settlement as far as possible on the lines of the settlement under

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the will. The clause, it is argued, embodies a hypothetical referential limitation which must be construed along with all the other terms of the settlement and in particular with the recital that the settlement was intended to fulfil the conditions of the testator's will so as to avoid a forfeiture. Great stress was also laid on the close correspondence between the provisions of the testator's will and those of the settlement. This argument takes two forms. It is conceded that on its face clause 5 might, if it stood alone, have no effect save to create a resulting trust in favour of the settlor, since the disposition does not give the trustees any sufficient or certain directions, in particular because there is no statement whether or not the settlor is to be treated as dying intestate and a bachelor. But it is said the condition antedates the settlor's death and treats it as anterior to that of the testator, and on that hypothesis it must be taken that the settlor was intestate and a bachelor and solvent at the date of his hypothetical death as in fact at the assumed time he was: at the date of the settlement all the facts were known, and hence the limitation would have the effect of throwing the fund into the testator's estate, in which event it would be dealt with on the terms of the settlement under the will; thus Ronald Sassoon must be taken to have made such a settlement as the will requires. I cannot accept this argument. It is not merely that no evidence is forthcoming as to whether Ronald Sassoon was actually intestate, a bachelor and solvent during the testator's lifetime; I think it illegitimate in this way to confuse hypothesis and fact and furthermore I think the effect of clause 5 must be ascertained by what it expresses; the disposition is imperfect because on its terms, by which it must be judged, it is too vague and uncertain.

The appellants then rely on an alternative argument on the words of clause 5, read with the context, which is that the clause 5 is referential and must contemplate a settled fund to which the hypothetical death of Ronald Sassoon before the testator would be relevant, and in such event a definite scheme of limitation is to be found by the references in the settlement to the testator's will: in that way, it was

contended, clause 5 follows on the lines of the testator's settlement and fulfils the condition. I find it impossible to accept this argument. It is, I think, too remote from the actual language. Indeed, the words of clause 5 seem to me to create rather a direct disposition than a referential limitation in any sense.

But it has been contended further on behalf of the appellants that, if the bare literal construction of clause 5 does not give the effect which is claimed, the true meaning is to be ascertained by regarding the clause as elliptical and on its face calling for a supplement which will express the settlor's true intention. It is said that the words "as if" are clearly elliptical, and hence some words must be supplied: What then these words are must be gathered in part from the close correspondence of the provisions of the settlement with the testator's will throughout, and also from the stated hypothesis of the settlor dying without leaving issue in the testator's lifetime. It is also said that the words "shall be dealt with" point to an intended chain of limitations, the nature of which is further defined by that part of the recital which expresses the settlor's desire to settle the funds in accordance with the provisions of the testator's will and by the further recital that the settlement is in pursuance of that desire. Hence, it is contended, that the true meaning of clause 5 can be fully expressed if the elliptical words are regarded as completed in some such form (to take one of several suggestions made on behalf of the appellants) as the following:—

"Shall be dealt with as [in the like event the settlor's portion would be dealt with under the testator's will on the hypothesis] if the settlor had died," etc.

The result would be to import in favour of Mrs. Ezra and her issue the various trusts powers and provisions declared by the testator's will, and the settlement would thus be on the lines as far as possible of that will. This result, it was contended, would be thus achieved as a matter of construction and not of rectification.

In support of the argument, a number of authorities have been cited for the propositions that in construing the clause

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H. L. (E.) the document as a whole and all parts of it must be taken into account, and that the clause must be controlled by the recitals, and that, if the intention is clear, the Court must mould the refractory words in order to give effect to that intention. I have considered the various cases cited, but can find no authority which justifies the appellants' contentions or which justifies under the guise of construction so drastic a re-writing and amplification of the actual words used. The views propounded on behalf of the appellants mean that whereas the earlier part of the relevant sentence is dealing with the trust fund, there is to be introduced into the part following the words "as if," a different subject matter, that is, the settlor's portion under the will. It seems however to me that the only legitimate, or indeed possible, construction is one which continues the same universe of discourse, that is, the trust fund, throughout the sentence. The change proposed, which is a change not merely in words but in idea, could only be effected, if at all, by rectification. The essential feature of the appellants' case is in fact an attempt to ask the Court to do what the settlor might have done but has not done. Even if the settlor has sufficiently shown a desire to settle the fund in pursuance of the provisions of the will, he has not in fact so settled it; indeed the desire or purpose to do so which is stated in the recitals is simply a general desire to achieve a result without any indication of the particular form in which he was minded to carry out that desire. The particular form embodied in the operative clause is what in fact he adopted. How he might have framed the limitations so as to comply with the will, if he had not adopted the words he has, must be matter of mere conjecture.

I must however deal shortly with the authorities which have been so strenuously urged on behalf of the appellants as leading to the contrary conclusion. It must be remembered at the outset that the Court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used. There is often an ambiguity in the use of the word "intention" in cases of this character. The

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word is constantly used as meaning motive, purpose, desire, as a state of mind, and not as meaning intention as expressed. The words actually used must no doubt be construed with reference to the facts known to the parties and in contemplation of which the parties must be deemed to have used them: such facts may be proved by extrinsic evidence or appear in recitals: again the meaning of the words used must be ascertained by considering the whole context of the document and so as to harmonize as far as possible all the parts: particular words may appear to have been used in a special sense, which may be a technical or trade sense, or in a special meaning adopted by the parties themselves as shown by the whole document. Terms may be implied by custom and on similar grounds. But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention: these matters may be established, as they generally are, by extrinsic evidence. The Court will thus reform or re-write the clauses in order to give effect to the real intention. But that is not construction, but rectification.

The appellants' counsel have here relied on the statement in the recitals that the settlement is intended to be in pursuance of the provisions of the testator's will and have argued that the operative words must somehow be treated as carrying out that intention, however refractory from that aspect these words may be. Reliance has been placed on Lord Esher's dictum in *Ex parte Dawes* (1): "If the recitals are clear and the operative part is ambiguous, the recitals govern the

(1) 17 Q. B. D. 275, 286.

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H. L. (E.) construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." But in that case the Court looked at the recitals simply in order to identify "what was intended to be conveyed, and what was in the contemplation of the parties" (1): there was no idea of remoulding the words of the operative clause so as to make it fulfil a general intention expressed in the recitals but not carried out in the operative words. I think that such a course would be in truth as illegitimate as to use expressions of intention brought from any other source than the recitals, and to admit evidence not admissible except on an issue of rectification. As was said by Holt L.C.J. in *Bath & Montague's Case* (2): "The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation." The nature of recitals as statements of facts which are in the contemplation of the parties, is illustrated by the Scotch term "narrative." An authority which emphasizes the distinction between such a case as *Ex parte Dawes* (3), where the recitals helped to define the scope of doubtful words and a case where it was sought to use recitals (or narrative) to "control" or change the directions of a deed, is the case of *Mackenzie v. Duke of Devonshire* (4): there was in that case a final limitation to the "heirs female" of the settlor's body. There were two daughters left. In Scots Law these words meant "heirs portioners": it was argued that the deed should be construed as leaving the property to the elder daughter, because it was recited as the main purpose of the deed that it was intended to enable the heirs to support the dignity and title of the Earldom. The House rejected the contention: Lord Halsbury L.C. said (5): "I never in my life heard of the language of a deed which contained a perfectly unambiguous provision

(1) 17 Q. B. D. 289.

(3) 17 Q. B. D. 275.

(2) (1693) 3 Cas. in Ch. 55, 101.

(4) [1896] A. C. 400.

(5) [1896] A. C. 406.

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being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made." Lord Watson said (1): "The narrative words come to no more than this: 'My intention is to do' so and so, and you may add this, 'and I have accomplished that purpose by the provisions which follow.' In such a case the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction." Lord Shand said (2): "Although it might appear that there was a failure to fulfil the intention of the truster, I should still give effect to the operative words of the deed, because his directions are given in distinct terms." I regard this authority as affording direct guidance in the present case. The converse type is illustrated by another decision of this House, *Orr v. Mitchell* (3), to which Lord Watson was also a party, in which it was held that the narrative clauses did control the dispositive or operative clauses. The problem there was to identify what was conveyed, whether or not the conveyance was to be read in a wider or narrower sense: the narrative was held to give a key to ascertain what the deed was conveying: Lord Macnaghten put the issue on a broad canon of construction, common to the law both of England and Scotland—namely, that when the words in the operative part are "susceptible of two constructions the context may properly be referred to for the purpose of determining which of the two constructions is the true meaning." (4) He adds that "the rule applies though one of the two meanings is the more obvious one, and would necessarily be preferred if no light could be derived from the rest of the deed." But in the settlement under discussion, the actual words of clause 5, however read, are not in my opinion susceptible of the meaning for which the appellants contend, however the context and all the parts of the deed are read with it. The language of clause 5 apart from drastic

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(1) [1896] A.C. 407.

(2) *Ibid.* 408.

(3) [1893] A. C. 238.

(4) *Ibid.* 254.

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I need not go through other cases in which with varying results the effect of recitals has been considered. I find many cases in which the canon of construction stated in *Orr v. Mitchell* (1) has been applied, so that general words in the operative clause have been treated as limited by a more restrictive description of the subject-matter in the recitals, but I have found no case which is contrary to the principles laid down in *Mackenzie v. Duke of Devonshire*. (2) A later case on these latter lines is *In re Bostock's Settlement* (3), where a general intention appeared in the settlement to give to the children absolute interests in the freeholds, but it was held on the actual language that the children took life estates only, there being no question of reforming or rectifying the instrument. "In these circumstances," said Younger L.J. (4), "all that the Court can do is to construe it according to the import of the words used." It is true that there the reason why the words were not susceptible of any other meaning was that their construction was determined by a rule of law. But that is only one means of deciding whether words are or are not susceptible of a particular meaning. In *Mackenzie v. Duke of Devonshire* (2) the test put is that of "the natural ordinary meaning of the words," which does not exclude a meaning affixed by a rule of law.

Nor is it here necessary to examine in detail the various authorities of another type quoted on behalf of the appellants. These authorities appear to me merely to illustrate a common rule of construction which may be thus stated in the words of Lord Watson in *Mackenzie's* case (5); "Where words are capable of being modified or qualified in the context in which they occur it may be legitimate to ascertain how far one reading or another would best promote the intention of the maker of the deed." This principle—namely, that the meaning of a document must be ascertained by reading it as a whole

(1) [1893] A. C. 238.

(2) [1896] A. C. 400.

(3) [1921] 2 Ch. 469.

(4) Ibid. 489.

(5) [1896] A. C. 407.

and with the result in many cases of qualifying the *prima facie* meaning of a clause if it were taken by itself, is frequently applied in all contracts, whether in the studied productions of equity draftsmanship or the cruder efforts of men of business. Illustrations of its application might be multiplied almost indefinitely, but it is indeed rare that the decision on one contract is a direct guide to a decision on another. I shall refer to one case as a sample. In *In re Akeroyd's Settlement* (1) funds were settled to pay the income to the wife for life, and after her death to the husband until he should become bankrupt or until his death, whichever should first happen, and after the decease of the survivor of the wife or husband upon trust for the children of the marriage. The husband became bankrupt before his wife's death: he survived his wife. It was held that the words "until he (the husband) shall become bankrupt," referred to his bankruptcy even before she died, so that in that event he had forfeited all interest. Lindley L.J. did indeed say that it was a piece of bad drafting, but he held that that particular flaw did not require a suit for rectification. Perhaps a simpler case of the same type is *Beaumont v. Marquis of Salisbury* (2), where an estate conveyed to trustees and their heirs was held to be limited to an estate *pur autre vie* because that limitation was necessitated by the rest of the deed; the words as they stood were capable of that meaning, when read in their context. But these and similar cases seem to me to be far removed from the present.

In my judgment it is impossible to construe the settlement in the way contended for on behalf of the appellants. The words they seek to add cannot be written in by way of construction. The case is peculiar: its like may never occur again. But it must be decided in accordance with recognized and established principles. No doubt there has been a blunder by the draftsman. He has adopted in the settlement a correspondence merely textual and verbal with the provisions of the will, forgetting that he is dealing with a distinct and different fund, belonging not to the testator but to the settlor, vested in different trustees and the subject of a different

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(1) [1893] 3 Ch. 363.

(2) 19 Beav. 198.

H. L. (E.) settlement. The various and differing attempts of the appellants' counsel to introduce a form of words which will give the desired result, merely emphasize how wide a departure they seek to effect from the actual words of the settlement. I do not dwell on certain minor difficulties which might arise if the language of the settlement could be changed into any of the formulae suggested in argument.

In my judgment the appeal should be dismissed with costs.

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Orders appealed from affirmed, and appeals dismissed with costs.

Lords' Journals, Nov. 23, 1934.

Solicitor for appellants: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Sanderson, Lee & Co.*

[HOUSE OF LORDS.]

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DE BEECHE AND OTHERS APPELLANTS ;

AND

THE SOUTH AMERICAN STORES
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AND THE CHILIAN STORES
(GATH AND CHAVES) LIMITED . } RESPONDENTS.

Bills of Exchange—Rent—Payable in Chile by first class bills on London—Meaning of supervening Chilean Legislation—Restriction of international exchanges—Method of payment rendered impossible—Evidence—Admissibility—Meaning in Chile of first class bills on London and of Legislation.

The respondents were jointly bound to fulfil the obligations contained in leases of premises in Santiago de Chile granted by the predecessors in title of the appellants. The leases provided the following way in which the rents should be payable: " Payment shall be effected monthly in advance in Santiago de Chile on the

* *Present*: THE LORD CHANCELLOR (VISCOUNT SANKEY), LORD BLANESBURGH, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

first day of each month by first class bills on London." In 1931, Chilean legislation supervened which the respondents maintained prevented them from acquiring foreign exchange in Chile or from paying the rents in Chile by drafts on London without the authorization of the committee established by the legislation to control exchanges, and that requests by them for such authorization from time to time had been refused by the committee. The Chilean legislation established a control of international operations of exchange and the transfer of funds abroad, entrusting such control to a committee or commission. The legislation defined international exchange transactions as "the purchase and sale of all kinds of currency and gold in any form and the bills of exchange, cheques, drafts, letters of credit, telegraphic orders, and documents of any other nature requiring the transfer of funds from Chile or vice versa."

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Conflicting evidence by Chilean experts was given as to the meaning in Chile of first class bills on London. The evidence accepted was that "payable in Chile in first class bills on London" had a special mercantile meaning in Chile—namely, "bills drawn in Chile by one or other of a select list of bankers and mercantile houses in Chile upon one or other of a select list of bankers and mercantile houses in London" and these were known technically as F.C.L. bills.

An advocate in Chile who had been Minister of Justice gave evidence that the F.C.L. bills came within the mischief of the Chilean legislation:—

Held, (1.) that the conditions precedent to the admissibility of evidence as to the meaning in Chile of first class bills on London had been fulfilled—namely, the evidence did not conflict with a statutory definition, was of a usage common to the place in question and expounded without contradicting the terms of the contract.

(2.) that though witnesses could be called to prove foreign law, the Court was at liberty to look at a translation of the passages in question and to consider what was their proper meaning, but the Court would have regard not only to its own view of the foreign law but to the interpretation put upon it by a competent foreign authority.

Concha v. Murrieta (1889) 40 Ch. D. 543; *Buerger v. New York Life Assurance Co.* (1927) 96 L. J. (K. B.) 930; 43 Times L. R. 601; *Princess Paley Olga v. Weisz* [1929] 1 K. B. 718 applied.

The Chilean legislation made it impossible for the rent to be paid as directed, as the mode of payment as already interpreted would have been an international exchange transaction within the meaning of the Chilean legislation.

Decision of the Court of Appeal (November 29, 1933) affirmed.

APPEAL from an order and judgment of the Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) reversing the judgment of du Parc J. (July 13, 1933). The material facts are stated

H. L. (E.) in the headnote and the full facts are stated, together with the material articles of the Chilean legislation and the view taken by the Court of Appeal, in the judgment of the Lord Chancellor.

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1934. Oct. 22, 23, 25. *Pritt K.C.* and *Ernest Hancock* for the appellants. There is no satisfactory evidence that the phrase "first class bill on London" is a term of art. Such a bill means one of such reliability that any ordinary person ought to accept it. The trial judge was right in concluding that the matter was not established. The custom must be certain and reasonable. It is not reasonable to say that drafts on unexceptionable banks and accepted by unexceptionable banks are not good.

In *Blackett v. Royal Exchange Assurance Co.* (1) evidence of usage that underwriters never paid for loss of boats on the outside of a ship was held to be inadmissible. You cannot invoke evidence to contradict what is plain. If goods are made payable by bill evidence cannot be received to show that that means "approved bill," *Hodgson v. Davies.* (2)

He also referred to *Ward (Lord) v. Lumley.* (3)

Assume that Mr. Keik's evidence is not accepted as making a custom, then it is obvious that there are a number of ways in which good bills could be obtained.

The onus is on the respondents to show that their obligations under the leases were rendered illegal or impossible by the laws of Chile. The respondents could deliver a first class bill on London in Santiago without any illegality and therefore any circumstances of the difficulties of procuring such bills owing to the funds of the respondents being frozen in Chilean currency are irrelevant. The respondents have not established that the words "first class bills on London" were used in the leases in any other than their ordinary meaning.

Oct. 25 and 26. *Evershed K.C.* and *Harold Murphy* for the respondents. The evidence as to the meaning of the phrase "first class bills on London" contained in the leases was

(1) (1832) 2 C. & J. 244, 249.

(2) (1810) 2 Camp. 530.

(3) (1860) 5 H. & N. 87, 656.

admissible because without it the House could not decide what that phrase meant in Chile, and therefore evidence of usage or custom becomes admissible. On the true construction of the leases, which were Chilean documents providing for payment of rent to a Chilean lessor for the use of premises in order to carry on a Chilean business, payment was to be effected by bills drawn on Chile. Having regard to the evidence, payment was on the true construction of the leases to be effected by bills drawn by a banker or merchant house in Chile recognized as first class upon a first class banker or merchant house in London.

The committee or commission set up by the statutes had jurisdiction to prohibit any particular transaction, and when asked refused leave to the respondents to pay in the mode prescribed in the leases. So far as there was a conflict of evidence whether payment of the rents was rendered illegal or impossible, the Court in England ought itself to construe the Chilean laws, and upon their proper construction payment in Santiago by sterling bills on London was prohibited by such laws. Assuming the committee or commission had no jurisdiction to refuse leave to the respondents, a Court in England will not inquire into their jurisdiction or acts. That would be contrary to the comity of nations.

On the principle laid down in Taylor on Evidence, 10th ed., s. 1160, ch. 4, p. 817, the evidence given must not conflict with the legal meaning of the words; it must be of a usage common to the subject matter and must not be repugnant or inconsistent with the contract itself. The phrase "first class bill on London" is purely a term of art and quite well known. The Court rightly accepted the evidence of Mr. Keik as an experienced expert on the subject; the trial judge was influenced by the fact that two eminent legal witnesses had never heard of such bills. The particular law of Chile which rendered this transaction illegal is Art. 6 of the first law No. 4973 dated July 30, 1931, which brought within its sphere the getting of a bill or the handing it over, and that article plainly refers to operations in national currency. Arts. 1, 3 and 6 were made subject to the control of the committee

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H. L. (E.) established to control international exchanges, who were given power to decide whether any proposed operations were within the mischief legislated for in those articles.

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He referred to Dicey's Conflict of Laws, 5th ed., p. 657, and *Buerger v. New York Life Assurance Co.* (1)

Pritt K.C. in reply.

The House took time for consideration.

1934. Dec. II. THE LORD CHANCELLOR (VISCOUNT SANKEY). My Lords, the appellants are the successors in title of the late Hector Beéche in certain buildings and sites in Santiago de Chile. Mr. Beéche was at all material times a Chilean subject though for the most part resident in Paris. By an instrument executed at Buenos Aires on June 18, 1909, before the Chilean consul there he undertook to erect a building on a site forming part of his property in Santiago de Chile and granted a lease of the building from its completion to an Argentine company for twenty-five years at a rent for the first five years of 7500*l.* sterling per annum plus 10 per cent. of the cost of the building, increasing by 1000*l.* sterling for each subsequent period of five years. After stipulating for penal interest in the event of default in punctual payment the agreement provided in the fifth place as follows:—"Payment shall be effected monthly in advance in Santiago de Chile on the first day of each month by first class bills on London at ninety days sight."

In 1912 the Argentine company transferred all its assets and liabilities, including its rights and liabilities under the above-mentioned lease, to the respondents the South American Stores (Gath & Chaves) Limited, a company registered in England, hereinafter called "the South American Stores Company." On September 4, 1913, Mr. Beéche by an instrument also executed at Buenos Aires before the Chilean consul there, ratified this transfer and authorized the South American Stores Company to sublet the premises to the other respondents the Chilean Stores (Gath & Chaves) Limited, a company also registered in England and hereinafter called "the Chilean Stores Company."

(1) (1927) 96 L. J. (K. B.) 930; 43 Times L. R. 601.

In the exercise of this authority the South American Stores Company by the same document sublet the premises to the Chilean Stores Company which also bound itself directly to Mr. Beéche to fulfil all the terms of the principal contract of lease. Both companies were to continue jointly bound to Mr. Beéche.

Meantime, on August 28, 1913, Mr. Beéche had granted a twenty-two years lease of other premises belonging to him at Santiago de Chile to the Chilean Stores Company. The rent was fixed at 600*l.* monthly, with periodical increments, "payable in Santiago de Chile at the residence or office of the owner or his representatives monthly in advance on the first working day of each month in first class bills on London at ninety days sight." On December 15, 1913, Mr. Beéche granted to the Chilean Stores Company a further lease of certain additional premises in Santiago de Chile for twenty years from September 1, 1915, at a rent of 50*l.* sterling per month with periodical increments, payable as in the preceding lease. Both of the two last mentioned leases were executed at Buenos Aires before the Chilean consul there. Finally, on December 3, 1918, at Santiago de Chile Mr. Beéche granted a lease to the Chilean Stores Company of further premises in Santiago de Chile for sixteen years and ten months from November 1, 1918, at a rent of 800*l.* sterling per month with periodical increments, payable as in the two preceding leases. The Chilean Stores Company undertook to obtain a guarantee from the South American Stores Company for the strict fulfilment of all the obligations contained not only in this last mentioned lease but also in the two preceding leases of August 28 and December 15, 1913. This guarantee was subsequently given by the South American Stores Company on December 12, 1918. It will thus be seen that in each of the four leases the stipulated medium of payment was "first class bills on London at ninety days sight" and the place of payment was in each case Santiago de Chile.

The rents reserved by the four leases were duly paid by the Chilean Stores Company up to and including November 1, 1931, although the stipulated medium of payment was not

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adhered to. Since that date the respondents maintain that they have been disabled by supervenient Chilean legislation from paying their rents as stipulated and they have deposited in court in Chile the amount of the rents in Chilean pesos at the current rate of exchange for sterling, subject to a 20 per cent. deduction directed by Chilean law.

The Chilean legislation in question consists of two statutes. The first of these statutes is dated July 30, 1931, and by its first article establishes "control of the international operations of exchange and the transfer of funds abroad" and entrusts this control to a committee. The third article of the statute empowers the committee to prohibit (*inter alia*) "(a) any operation of international exchange which does not come within the regular and legitimate movement of the economical and normal financial requirements or the dealing with special requirements"; and provides that "the classification of the operations will rest with the said control committee." Art. 4 enacts that "the Central Bank of Chile will be the only entity which can purchase and to which international exchange may be freely sold"; that other banking undertakings "can purchase . . . international exchange . . . by permission of the control committee"; and that the operations with which the article deals "may only be carried out with the previous authorisation of the control committee." International exchanges are defined by Art. 6 as "every class of operations connected with bills of exchange, cheques, drafts, letters of credit, transfers of funds or orders for payment in foreign currency or national money if these are payable or should be completed abroad and every description of operations with bank-notes or foreign currency with credits existing abroad in favour of persons domiciled or residing in Chile or with personal securities in foreign currency by undertakings domiciled abroad." By Art. 7 it is provided that "without the previous authorisation of the control committee it is not permissible (*inter alia*) (a) to enter into contracts in the country in foreign currency nor require fulfilment of contracts of this description of currency entered into outside the country

subsequent to this law." Art. 13 imposes penalties for breach of the statute. H. L. (E.)

The second statute, which is dated April 20, 1932, annulled the previous statute. Art. 1 subjected "all international exchange transactions" to the provisions of the Act and defined international exchange transactions as denoting "the purchase and the sale of all kinds of currency and gold in any form and the bills of exchange, cheques, drafts, letters of credit, telegraphic orders and documents of any other nature requiring the transfer of funds from Chile or vice versa." By Art. 2 the control of international exchange transactions was vested in an exchange control commission; Art. 3 provided that "only the Central Bank of Chile shall buy and sell international exchange"; Art. 4 required the commission to "consider the particulars which may justify authorising the respective applicants to acquire instruments of international exchange and it shall fix the amount which each applicant may acquire" Art. 9, after providing for the liquidation by instalments of foreign currency deposits in commercial banks and of foreign currency obligations in favour of any bank, enacted that "other obligations in foreign currency shall be demandable after authorisation of the commission of exchange control and in the amounts which the latter shall indicate. . . ." Art. 11 provided that "the payment of the prices stipulated in foreign currency in sales, contracts and rental of properties in Chile may be demanded in Chilean currency on the date of its maturity and at the exchange of the day of payment."

In the present action the appellants sued the respondents for 53,359*l.* 17*s.* 9*d.*, being the agreed amount in sterling of the arrears of rent under the four leases, with accrued interest. The respondents in their defence relied on the Chilean statutes whose material provisions I have summarized and alleged that these laws rendered it illegal or impossible to acquire foreign exchange in Chile or to pay the rents in Santiago de Chile by drafts on London without the authorization of the control committee or commission which they had been unable to obtain. It appeared that the respondents had

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H. L. (E.) repeatedly applied to the committee or commission to authorize a draft at ninety days on London for the purpose of paying their rents as they fell due but that their applications had been uniformly rejected.

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My Lords, it cannot be controverted that the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do. The only questions accordingly which arise for decision in this appeal are: (1.) What is the true interpretation of the obligation which the respondents have assumed in the matter of the payment of the rents due under the four leases; and (2.) what is the effect of the Chilean legislation upon this obligation.

du Parcq J. gave judgment for the sum sued for. He was not satisfied that the critical words "first class bills on London" meant, as the respondents contended and Mr. Keik, a director of Erlangers Limited, testified, bills drawn by persons of well known credit in Chile on bankers in London. If the words bore this meaning the learned judge was of opinion that such bills could not be obtained in Chile without the sanction of the statutory authority. But as he held that payment could, within the meaning of the leases, be made by bills drawn by a banker in London on a banker in London and the respondents had not established that it was impossible for them to procure such bills, the defence failed. On appeal Scrutton and Lawrence L.JJ. both accepted Mr. Keik's evidence and held that under the Chilean statutes it was impossible without the sanction of the statutory authority to obtain in Chile first class bills on London within the true meaning of the leases. Greer L.J. rejected Mr. Keik's evidence and agreed with the interpretation placed on the critical words by the trial judge, but he was of opinion that the second, but not the first, Chilean statute rendered it illegal to make payment in the stipulated manner even as so interpreted without the sanction of the statutory authority; he was accordingly in favour of holding that that part of the sum sued for which was applicable to the period before the enactment of the second Chilean statute

was recoverable, but that the action should be dismissed as regards the balance. H. L. (E.)

I now turn to the two questions which arise for decision.

As to (1.), What is the true interpretation of the obligation which the respondents have assumed in the matter of the payment of the rent due under the four leases? The difficulty here arises on the words "payable in Santiago de Chile at the residence or office of the owner or his representatives monthly in advance on the first working day of each month in first class bills on London at 90 days sight." What is the meaning of "first class bills on London"? Upon this point both parties tendered evidence, the first witness for the appellants being Mr. Jose Serrano and the first witness for the respondents Mr. Keik. They took opposite views of the meaning of the words and it becomes necessary to decide whose evidence the Court ought to prefer. Having regard to the facts (1.) that the term is a commercial one rather than a legal one; (2.) that Mr. Serrano is a young man, who was only called to the Chilean Bar some four years before this case came on; (3.) that Mr. Keik is a director of Erlangers Limited, who has had 47 years' experience of banking in the City of London, and whose firm do a very large business in South America, including Chile. I am of opinion that the House ought to accept the evidence of Mr. Keik, which was to the effect that the words in question bear in Chile a special mercantile meaning—nameiy, bills drawn in Chile by one or other of a select list of bankers and mercantile houses in Chile upon one or other of a select list of bankers and mercantile houses in London and known technically as F.C.L. bills.

It was objected at your Lordships' Bar that evidence of this character was inadmissible. With that contention I do not agree. Without such evidence the Court could not have come to a proper conclusion on what "first class bills on London" mean in Chile. If the words are plain and unambiguous, it would be wrong, unless for exceptional reasons (as to which see *Smith v. Wilson* (1)) to admit evidence as to their meaning. For example, "freight," which is a well understood term in a

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 1934 though its method of payment, which varies in each port, can.
 DE BEÉCHE *Brown v. Byrne*. (2) Rent is rent, but the meaning of words
 v. prescribing the method of payment of rent may in some cases
 SOUTH be explained by evidence. Undoubtedly the line between
 AMERICAN admissible and inadmissible evidence of usage or custom is
 STORES LD. difficult to draw, and some of the cases are hard to reconcile
 AND with any clear principle.
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Without endeavouring to give an exhaustive definition of what evidence may be admitted, there are in cases like the present three conditions precedent to its being accepted:—
 (1.) the evidence must not conflict with a statutory definition ;
 (2.) the evidence must be of a usage common to the place in question ; and (3.) the evidence must expound and not contradict the terms of the contract.

In my view, the words “ first class bills on London ” in this context are a term of art and point plainly to a specific thing which is to be handed over to the lessor, or his representative, as and for payment of rent at Santiago on the first working day of each month. The evidence as to what that specific thing really was, was, in these circumstances, admissible. The construction of the lease, therefore, is that it called for payment of the rent by bills on London drawn in Chile as hereinbefore described.

As to (2.), What is the effect of the Chilean legislation on this obligation? Evidence upon this point was given by Mr. Serrano, whose name I have already mentioned, and Dr. Enrique Bermudez. If one had to choose between them, I should prefer the evidence of Dr. Bermudez, having regard to his greater experience and knowledge. Dr. Bermudez had practised as an advocate in Chile for 20 years. He had been President of the Chamber of Deputies, Minister of the Interior, Minister of Justice, Minister in Mexico and Ambassador to the Argentine and Spain.

While it is true that witnesses called to prove foreign law may refer to any passages in the code of their country as containing the law applicable to the case, the Court is at

(1) (1877) 25 W. R. 305.

(2) (1854) 3 El. & Bl. 703.

liberty to look at those passages and to consider what is their proper meaning: *Concha v. Murrieta*. (1) See also the recent decision of the Court of Appeal in *Buerger v. New York Life Assurance Co.* (2)

In the present case your Lordships have agreed translations of the Chilean laws applicable to the present circumstances and we are entitled and indeed bound to construe the relevant provisions and to determine their meaning and effect after consideration of the English version before us. Holding as I do that the lease called for payment of rent by bills drawn in Chile as hereinbefore described, was such payment rendered illegal under the laws of Chile? There are two laws applicable: number 4973, dated July 30, 1931, and number 5107, dated April 20, 1932. Lord Justice Greer in the Court of Appeal thought that the first of these laws did not touch the plaintiff's case at all, but with all deference I am unable to agree with him. He was apparently under a misapprehension as to the effect of Art. 1, which he regarded merely as a preamble, and not really as a prohibition. It is not necessary to make a microscopical examination of each one of the sections in question. Dr. Bermudez was clearly of the opinion that the class of bills required by the lease, that is F.C.L. bills, came within the mischief of the first law.

Art. 6 brings within its sphere: (1.) the getting of a bill; and (2.) the handing over of a bill. Both these are operations connected with Bills of Exchange and Art. 1 places these operations under the control of the new committee. Arts. 4 and 5 are mere machinery to carry out the purpose of the legislature. A person would have to go to the committee for leave to purchase a bill and, if he did get such leave, would have to go to the Bank of Chile for the bill. All such operations are under the control, and subject to the decision of, a control committee. It is admitted that the respondents applied for leave from time to time to the committee and were always unable to obtain it. Without such leave it would have been illegal, and as it appears to me on the evidence impossible,

(1) 40 Ch. D. 543.

(2) 96 L. J. (K. B.) 930;
43 Times L. R. 601.

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H. L. (E.) to make payment of the rent in the manner prescribed. In no other form was rent payable. By English law an act is illegal if it necessitates something which is illegal. Beyond that an English Court will have regard not merely to their own views of the foreign law, but to the interpretation put upon it by a competent foreign authority (see *Princess Paley Olga v. Weisz*. (1))

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In my opinion we ought not to disagree with the conclusion arrived at by the competent authority in Chile, or to differ from their construction of the law.

With regard to the second law, it is not necessary to say anything beyond this: that Arts. 1, 2 and 9 clearly make such a transaction as is under discussion in the present case illegal, and on this point the Court of Appeal came to a unanimous decision.

For these reasons, the appeal should be dismissed with costs.

My noble and learned friend, Lord Blanesburgh, who has had to go to the Privy Council to resume the hearing of a part-heard appeal there, asks me to say that he agrees with the opinion which I have just expressed.

LORD TOMLIN. My Lords, I also agree, and I agree with the opinion which has been prepared by my noble and learned friend, Lord Russell of Killowen, which I am about to read.

LORD RUSSELL OF KILLOWEN (read by Lord Tomlin). My Lords, I can state briefly the reasons which influence me in reaching the conclusion that this appeal should fail. There is no necessity to recapitulate the facts.

In the first place I have no doubt that the lease of June 18, 1909, and the other leases in the case, impose no obligation on the respondents to pay rent thereunder in any other way than by delivering each month in Santiago de Chile to the lessor or his representative first class bills on London at 90 days sight, for the appropriate sterling sum. Upon the true construction of those documents no other form of rent is, in my opinion, reserved or payable.

(1) [1929] 1 K. B. 718.

In the second place, the evidence of Mr. Lewis Holland Keik satisfies me that in these contracts, which relate to premises in Chile and the performance of which must take place in Chile, the words "first class bills on London" bear a technical and special meaning and signify not any bill on London which could be called first class by reason of the financial repute and solvency of the parties to it, but a bill drawn in Chile by one of a selected list of bankers and mercantile houses in Chile upon one of a selected list of bankers and mercantile houses in London. Thus a bill drawn elsewhere than in Chile on London would not be a "first class bill on London" within the commercial meaning of those words (or their Spanish equivalents) in Chile; nor would a bill drawn in Chile answer this description, no matter how solvent the parties to it might be, if they were not among the selected bankers and houses. For the purposes of this case, however, the important result of the evidence is that in order to pay the rents under the leases it would be necessary for the lessees to deliver in Chile bills of exchange drawn on London in Chile.

This evidence of Mr. Keik's was in my opinion admissible as evidence of the peculiar meaning which the words bear in Chilean contracts relating to bills of exchange. The evidence resolves the latent ambiguity which lurks in the words in question; and it must be accepted, for there is no other competent evidence on the point—I say no other competent evidence, for I do not regard the two lawyers as proper witnesses to depose to matters of commercial usage; and Mr. H. G. de Beéche was obviously no expert on the point. Greer L.J. seems to have thought that Mr. Keik's evidence should be disregarded owing to the state of the pleadings; but the point to which his evidence was directed was plainly raised and argued at the trial without any objection by the plaintiffs, who indeed obtained leave to call, and did call, Mr. H. G. de Beéche as a witness in rebuttal.

In the third place, upon a consideration of the Chilean Laws No. 4973 and No. 5107 and of the relevant evidence given by Mr. Serrano and Dr. Bermudez, I have come to the conclusion that at all material times it would have been illegal according to

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H. L. (E.) Chilean law if the lessees had, without the permission of the Control Committee set up under Law No. 4973, or the Exchange Control Commission set up under Law No. 5107, obtained and delivered in Chile bills of exchange drawn in Chile on London for the purpose of satisfying their obligations under the leases. To do so would have been an operation of International Exchange within the definition contained in Art. 6 of Law No. 4973, the control of which is vested in the Control Committee; and it would have been an International Exchange transaction within the definition contained in Art. 1 of Law No. 5107, the control of which is vested in the Exchange Control Commission.

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Finally, we must I think proceed upon the footing that the necessary permission of the committee or commission, as the case may be, was regularly applied for by the lessees, was refused, and could not be obtained. The applications and refusals are admitted and no suggestion was made impeaching the bona fides of the lessees in making the applications. They bona fide required and desired permission, but were unable to obtain it.

In these circumstances, my Lords, it is in my opinion clear that it became impossible for the lessees to perform their contracts under the leases without committing breaches of the Chilean law and rendering themselves liable to the consequent penalties. This affords a defence to the action.

It was suggested in argument that in some way the lessees had not established a complete defence because they had not given affirmative evidence to prove that they had not in their possession a supply of "first class bills on London" already drawn in Chile and acquired by the lessees before the coming into operation of Law No. 4973, which bills, it was said, could have been applied without illegality in satisfying the obligations under the leases. I do not pause to consider whether such bills could without illegality have been so applied, for I consider the suggestion fantastic, and one which it is not open to the appellants to make if they admit, as they do, that the applications of the lessees to the committee and commission were bona fide applications.

The result is that this appeal must fail as against all the respondents.

LORD MACMILLAN. My Lords, I concur.

*Order appealed from affirmed and appeal dismissed
with costs.*

Lords' Journal, Dec. II, 1934.

Solicitors for appellants: *Smiles & Co.*

Solicitors for respondents: *Mckenna & Co.*

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[PRIVY COUNCIL.]

C. KASIVISVANATHAN CHETTIAR. . APPELLANT ;

AND

C. V. S. CHOKALINGHAM CHETTIAR . RESPONDENT.

J. C.*

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Dec. 3.

ON APPEAL FROM THE SUPREME COURT OF THE
STRAITS SETTLEMENTS.

*Straits Settlements—Limitation—Trust for specific purpose—Distribution
upon intestacy—Suit by administrator against his attorney—
Limitation Ordinance (Rev. Laws of S.S., 1926, No. 56), s. 9.*

Where the administrator of an intestate estate has given a power of attorney to act in the administration, and the attorney has obtained a transfer to himself of property knowing that it belongs to the estate, a suit by the administrator to make him accountable is a suit against a person in whom property has become vested in trust for a "specific purpose," within the meaning of s. 9 of the Limitation Ordinance of the Straits Settlements, and accordingly is not barred by any length of time. The purpose for which the property became vested in the attorney was specific, not only if he were regarded as a trustee for the

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administrator, but also if the purpose was to administer the estate and account for the residue to the next of kin.

Khaw Sim Tek v. Chuah Hooi Gnoh Neoh [1922] 1 A. C. 120 explained.

Lam Kin Sang v. Cheang Koh Sang [1929] S. S. L. R. 62 approved.

Appeal dismissed.

APPEAL (No. 33 of 1933) from a judgment of the Court of Appeal of the Supreme Court of the Straits Settlements, Singapore (September 14, 1931), reversing a judgment of Mills J. (October 25, 1930).

In 1925 the administrator de bonis non of an intestate who died in 1912 brought a suit in which, in 1928, the respondent was substituted as plaintiff. The appellant had been given in 1914 by the administrator a power of attorney to act in the administration. The plaintiff claimed in the suit to make him accountable in respect of five shares in a rubber estate (afterwards converted into a limited company) which had been transferred to him in 1915.

The suit was barred by the Limitation Ordinance (Revised Laws of the Straits Settlements, 1926, No. 56), unless s. 9 of the Ordinance applied.

By that section: "Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal personal representative or assigns, not being assigns for valuable consideration, for the purpose of following in his or her hands such property, shall be barred by any length of time."

The facts appear from the judgment of the Judicial Committee.

The Court of Appeal (Sproule A.C.J., Thorne J. and Terrell J.), reversing the trial judge, held that the suit was one to which s. 9 of the Ordinance applied and that accordingly it was not barred by limitation. It was declared that the shares were the property of the intestate estate and that the appellant was a trustee in respect of them; it was ordered that he should account and should be debited with punitive interest at 6 per cent. per annum.

1934. Oct. 15, 18, 19. (1) *Vaisey K.C.* and *Cecil Turner* for the appellant. The suit against the appellant was barred by art. 97 of the Schedule to the Limitation Ordinance, since it was not commenced within six years. Limitation was not excluded by s. 9 of the Ordinance, because the property was not vested in the appellant in trust for a specific purpose; distribution under an intestacy does not come within the section: *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*. (2)

Sir Gerald Hurst K.C. and *C. D. Myles* for the respondent. The words "trust for any specific purpose" in s. 9 are synonymous with the "express trust" in respect of which limitation is ousted in English law. The authorities show that to bring the case within that principle it is sufficient that the appellant obtained possession of the shares with knowledge that they were trust property: *Soar v. Ashwell* (3); *In re Eyre-Williams* (4) The appellant was in a fiduciary position and the property vested in him as trustee for the administrator. But even if he is treated as in the position of an administrator, the cases show that an administrator is in the same position as an executor or a trustee under a settlement: *Cooper v. Cooper* (5); *Patrick v. Simpson*. (6) In *Lam Kin Sang v. Cheang Kok Sang* (7) the Court of Appeal in the Straits Settlements, following a decision of the Court of Appeal in the Federated Malay States upon an Ordinance in the same terms, held that English equitable principles applied under s. 9, and that that view was in consonance with the judgment of the Board in *Khaw Sim Tek's* case (8), as the case did not deal with the question of distribution of an intestate estate generally, but with the particular position which there arose owing to a declared trust having been held to be invalid. The Trustees Ordinance (Rev. Laws, 1926, No. 144), by s. 2 defines a trust as including a constructive trust. The decisions in India

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(1) Only the arguments upon the question of limitation are reported; the respondent's counsel were called upon only as to that question.

(2) [1922] 1 A. C. 120.

(3) [1893] 2 Q. B. 390.

(4) [1923] 2 Ch. 533.

(5) (1874) L. R. 7 H. L. 53, 64.

(6) (1889) 24 Q. B. D. 128.

(7) [1929] S. S. L. R. 62.

(8) [1922] 1 A. C. 120,

J. C. with regard to "specific purpose" in the provision of the
 1934 Indian Limitation Act corresponding to s. 9 may not be
 C. KASIVIS- applicable in the Straits Settlements, but reference may be
 VANATHAN made to *Narrondas v. Narrondas*. (1)
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v.
 C. V. S. *Vaisey K.C.* in reply. The language of s. 9 excludes its
 CHOKALING- application to a trust to be inferred from a fiduciary relation.
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 CHETTIAR. The decisions in India as to the same provision of the Indian
 legislature are to that effect: *Kherdemoney Dossee v. Door-*
gamoney Dossee (2); *Raja of Ramnad v. Ponnusami Tevar* (3);
Bihari Lal v. Shiva Narain (4); Braddell's Law of the
 Straits Settlements, vol. ii, pp. 63, 64. It is conceded that
 in the Straits Settlements English principles of equity apply
 in a way in which they do not under Indian Acts. The
 appellant was not an administrator either in fact or de son tort.
 The judgment of the Board in *Khaw Sim Tek's* case (5) laid
 down that a "specific purpose" to be within the section
 "must be a purpose that is either actually and specifically
 defined in the terms of the will or the settlement, or a purpose
 which, from the specified terms, can be certainly affirmed."

Dec. 3. The judgment of their Lordships was delivered by

SIR SIDNEY ROWLATT. This is an appeal from the
 judgment of the Court of Appeal of the Supreme Court of the
 Straits Settlements (Settlement of Singapore), dated Septem-
 ber 14, 1931, setting aside the judgment of Mills J. delivered
 on October 25, 1930, and giving judgment in favour of the
 respondent.

The suit was begun by writ issued on March 9, 1925, by
 S. Muthuraman Chettiar, suing as the administrator de bonis
 non of one S. V. S. Supramaniam Chetty deceased (herein
 called "the intestate"). The respondent was substituted as
 plaintiff, suing in the same capacity, by an order dated
 September 26, 1928.

As originally framed the suit was against E Kong Guan.
 The appellant was added as a further defendant by an order
 dated September 7, 1925. The claim against the appellant,

(1) (1907) I. L. R. 31 Bom. 418. (3) (1921) I. L. R. 44 Mad. 277.

(2) (1879) I. L. R. 4 Cal. 455. (4) (1924) I. L. R. 47 All. 17.

(5) [1922] 1 A. C. 120.

with which alone this appeal is concerned, was to make him accountable for certain shares in a rubber estate called Leong Watt Hin Rubber Estate (afterwards converted into 1250 shares in Leong Watt Hin Estate, Ltd.) and the primary question was whether such shares, which passed into the hands of the appellant under the circumstances to be hereinafter examined, were the private property of the intestate or the property of a firm in which he was a partner, his share therein having been subsequently acquired by the respondent. On this issue there were concurrent findings of fact in favour of the respondent which their Lordships intimated at the hearing that they would not disturb and the main question left is whether the claim was barred by limitation. It is so barred unless the property in question became vested in the respondent in trust for a specific purpose within the meaning of s. 9 of Ordinance No. 56 (Limitations) of the Ordinances of the Straits Settlements.

For some time prior to 1912 the intestate had been the managing partner in a firm of money lenders carrying on business at Malacca under the style or "vilasam" of P.M.S. He also carried on a private business on his own account under the vilasam of S.V.S. His interest in P.M.S. was in the form of a one-half share in a Hindu undivided family which owned a quarter share in P.M.S. The family vilasam was V.E.S.

Before 1912 the intestate had become interested with Guan, the first defendant, in the rubber estate already mentioned, which it is convenient to call (as was done in the argument) "L.W.H."

In the early part of 1912, as the result of transactions which it is unnecessary to relate in detail, the position was as follows : The land was in Guan's name, but belonged to Guan and two other Chinese associated with him for the purpose of this venture. Guan's interest in it was to the amount of $\frac{13}{20}$, afterwards changed to $\frac{13}{22}$, the other two holding, after the alteration, $\frac{6}{22}$ and $\frac{3}{22}$ respectively. The intestate, as sub-partner with Guan, was entitled to 5 of his 13 parts or shares. About August, 1912, the intestate, being in bad health, left Malacca for India, where he died on December 9 of that year, leaving a widow and son, Shanmugan, and two daughters.

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J. C. On May 2, 1913, the widow gave a power of attorney to one
 1934 Kadappa to apply for letters of administration in the Straits
 C. KASIVIS- Settlements and these were granted to him on August 1, 1913.
 VANATHAN Kadappa was at this time managing P.M.S. as a paid agent.
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v.
 C. V. S. According to the evidence of Guan, Kadappa came to
 CHOKALING- Malacca about May, 1913, and discussed with him the
 HAM intestate's affairs, including the L.W.H. shares. In his
 CHETTIAR. examination in chief, Guan did not say whether this was before
 or after the grant of letters of administration. In his cross-
 examination he said it was before. In his re-examination he
 said Kadappa told him later that he had taken out the grant.
 The substance of the conversation according to Guan's evidence
 was that Kadappa told him to wait for the arrival of the
 intestate's son (Shunmugan). In cross-examination he said
 " Kadappa told me to hand the shares over to Shanmugan and
 the manager of P.M.S." In re-examination he gave Kadappa's
 words as being " Then " (referring to Shanmugan's arrival)
 " we can settle." It was suggested in the argument before
 their Lordships on behalf of the appellant, on the strength of
 this evidence, that Kadappa had, by these words spoken to
 Guan, administered this asset and that was the end of the
 matter. Their Lordships are unable to take this view. Apart
 from the doubt as to the date of the conversation, it does not
 appear to their Lordships that what took place amounted to a
 final dealing with the asset from the administrator's point of
 view.

In 1913, the appellant, who was already a partner in P.M.S.,
 went to India and acquired the share of the intestate's family in
 that firm. He was now the predominant partner and in 1914
 returned to Malacca and took over the management. On
 April 5, 1914, Kadappa gave a power of attorney to the
 appellant to act in the administration of the intestate's estate
 and as his attorney and in his name to perform a numerous class
 of acts, being those necessarily called for in an administration.
 The power gave the appellant power to appoint a substitute.
 Kadappa left Malacca for India in 1914 and died there in 1917.
 It was held at the trial of the present suit that this power of
 attorney was invalid. No argument founded on such a

contention was seriously pressed on the hearing of this appeal, and in view of the appellant's actions the question is an academic one.

In 1915, Shanmugan came to Malacca. It appears that according to the Hindu law applicable to the estate of the intestate, Shanmugan or the son was beneficially entitled to the whole, subject to maintenance of the widow and daughter till marriage. In the colony, however, the estate vested in the administrator, who alone could deal with it. This being the state of affairs, the appellant and Shanmugan on July 16, 1915, made an agreement evidenced by receipts exchanged between them, that they should divide the intestate's 5 shares in L.W.H. equally, each taking $2\frac{1}{2}$ shares. The appellant was—to quote the language of both receipts which is in this respect the same—“to take all actions to obtain agreement, &c.,” and he was to account to Shanmugan for his half. At the time of making this agreement, the appellant must have known that these shares belonged to the intestate's estate which he was administering.

Following on this arrangement of July 16, 1915, a meeting took place between Guan, the appellant, Shanmugan and one P. V. Palaniappa Chetty, when the three latter concurred in requesting Guan, firstly, to hand over to Shanmugan the scrip of certain shares which had belonged to the intestate, but with which this appeal is not concerned, and secondly, as regards the 5 shares in the L.W.H. property, that they should be transferred to P.M.S., Kasi, that is, to the appellant under the vilasam of the partnership P.M.S. From that time Guan said that he considered the owner of these 5 shares to be P.M.S.

In 1915, the property L.W.H. began to yield profits and there was a distribution among the partners in October of that year. The proportion attributable to the 5 shares of the intestate was paid to the appellant as P.M.S. Kasi, who also received all subsequent profits and, when the property was transferred to a company, all the dividends on the shares representing the intestate's interest.

On June 5, 1916, the appellant purported to exercise the power of substitution expressed to be conferred upon him by

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the power of attorney given to him by Kadappa and appointed one Muthiah Chettiar as his substitute for the purpose of the administration of the estate of the intestate.

There was evidence that, notwithstanding this substitution, and even after the death of Kadappa which occurred on November 24, 1917, terminating beyond all question the power of attorney given by him, the appellant acted as Kadappa's attorney and made an application to the Court in that character in connection with the sale of some land. In the view of their Lordships, however, a termination of the appellant's agency under power of attorney whether in 1916, by the substitution of Muthiar or in 1917 by the death of Kadappa, does not affect the situation, inasmuch as the appellant had already—namely, at the interview with Guan and Shanmugan in 1915, been recognized by Guan as the person to whom he was to account for the intestate's interest in the L.W.H. property. In pursuance of that arrangement (so Guan deposed), Guan subsequently—namely, by an indenture of July 5, 1916, formally transferred that interest to the appellant.

At the end of 1917, a few days before the death of Kadappa, the L.W.H. property was transferred to a company, called the Leong Watt Hin Estate Co., Ltd., and the appellant received, by direction of Guan, 1250 shares in that company as representing the intestate's interest.

Although by the agreement entered into with Shanmugan in July, 1915, the appellant had agreed to hold one half of the 5 shares for the account of Shanmugan, he did not account to him for any part of the profits he received. Early in 1924, Shanmugan came from India to Malacca and asked the appellant for the money due to him on the $2\frac{1}{2}$ shares. The appellant told him that his partners in P.M.S. claimed all the 5 shares as belonging to that firm and he suggested that Shanmugan should sue the partners. In the end, Shanmugan accepted from the appellant \$18,000 and released his claim. This, according to the appellant's evidence, was a private transaction of his own with which his partners in P.M.S. were not concerned.

On November 1, 1924, the intestate's widow gave a power

of attorney to one Muthuraman Chettiar to apply for letters of administration to the estate of the intestate, and on December 20 these were granted to him de bonis non.

On March 9, 1925, Muthuraman commenced the present suit against Guan as sole defendant, the appellant being added as second defendant by order dated September 7, 1925. Later in the proceedings the widow having died, the respondent took out letters of administration de bonis non as attorney of the daughters and was substituted as plaintiff.

By the statement of claim delivered on February 10, 1926, the plaintiff claimed as against the appellant a transfer of the 1250 shares in the L.W.H., Ltd., an account of the dividends received and damages. There was no allegation of fraud. The appellant, by his defence delivered on June 20, 1926, pleaded limitation and by supplemental defence delivered on October 11, 1926, pleaded (inter alia) that the right to the 5 shares in the original L.W.H. venture now represented by 1250 shares in L.W.H., Ltd., had been the property of P.M.S. and further, that any question regarding them had been settled by the agreement of July 16, 1915. On October 12, 1926, he served a third party action on Shanmugan, claiming to be indemnified by him against the plaintiff's claim by virtue of the arrangement in 1918 by which the appellant had bought out Shanmugan for \$18,000.

In 1927, Shanmugan commenced a suit in India against the appellant, claiming the 1250 shares in L.W.H., Ltd., and alleging that the agreements of 1915 and 1924 were obtained from him by misrepresentation and fraud. He raised the same contention in his pleading, delivered on February 6, 1929, as third party in the present action. The suit in India is still pending. The judge's notes at the trial of the present suit contain a statement that it had "been stopped pending this present case," but whether it has been formally stayed does not appear.

The present suit was tried before Mills J. in September and October, 1930. No oral evidence was called for the plaintiff, the present respondent. For the defendants oral evidence was given by, among others, Guan and the appellant. At the

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J. C. close of the case of the second defendant (the present appellant)
1934 his counsel admitted that he could make no case for indemnity
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VANATHAN and then that the third party claim be dismissed. Shanmugan
CHETTIAR was never called to substantiate his charges of fraud. Nor
v. had his counsel put those charges to the appellant on cross-
C. V. S. examination.
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On October 25, 1930, Mills J. delivered a written judgment in which he found that the 5 shares in the L.W.H. venture were the private property of the intestate. As regards the responsibility of the appellant for the L.W.H. shares, he dealt with the matter as follows : He held that the power of attorney from Kadappa to the appellant was void, as not authorized by the power of attorney given by the widow to the former and that the appellant, though accountable for the shares, was so only as an alienee without value given. He held, therefore, that the suit against him was barred by limitation, not having been brought within six years from July 15, 1915. He was of opinion that the appellant, in dealing with the shares on that date, was not acting as a trustee nor was he in the position of a person receiving trust property and dealing with it in a manner inconsistent with trusts which he was cognizant, because he did not receive the trust property as such, but throughout the negotiations which culminated in the arrangement of July 16, 1915, acted solely in his capacity as partner and manager of the firm P.M.S. and supported the claims of the firm in opposition to the claims of the deceased man's estate. The learned judge said that he confined himself to findings absolutely necessary for the determination of the issue in order that the parties to the Indian litigation might not be embarrassed by comments or dicta.

The respondent appealed to the Court of Appeal and the appellant cross-appealed against the dismissal of his third party claim against Shanmugan. This cross-appeal was, however, abandoned by counsel and Shanmugan was released from the proceedings in the course of the arguments. Shanmugan is not a party to the present appeal.

The learned judges in the Court of Appeal concurred with

the finding of the trial judge that the interest in the L.W.H. venture was the private property of the intestate, but held that the appellant, in dealing with that interest, had acted as a trustee by virtue of the power of attorney given to him by Kadappa and that he was not protected by limitation.

The learned judges further expressed the opinion that the appellant had been guilty of fraud at every stage of his transactions with the family of the intestate. The order of the Court directed an account of all moneys received by the appellant or his agents in respect of the L.W.H. shares and an account from November 20, 1917, of all moneys received or which ought to have been received by the appellant or his agents in respect of the 1250 shares in the L.W.H. Company and an inquiry to ascertain what had been the highest value which a share in the L.W.H. Company had reached prior to the date of the judgment. The Court further directed that in taking the account the appellant should be debited with punitive interest at the rate of 6 per cent. per annum. It was further, by consent of the third party, declared that the appellant was entitled to set off to the extent of Shanmugan's interest the \$18,000 paid to the third party under the arrangement of January 7, 1924, against what should be found due from him. Further consideration was adjourned with liberty to apply.

Upon the question of limitation, their Lordships agree with the conclusion arrived at by the Court of Appeal.

The point turns upon s. 9 of Straits Settlements Ordinance No. 56 (Limitations) which is as follows: "Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose or against his legal personal representative or assigns, not being assigns for valuable consideration, for the purpose of following in his or her hands such property, shall be barred by any length of time."

The cardinal fact in the case is that the appellant in dealing with this asset of the intestate's estate acted in the character of attorney to the administrator. The arrangement between the appellant and Shanmugan on July 16, 1915, was entered

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into to deal with the question whether the interest in the L.W.H. venture had been the intestate's private property, as Shanmugan was alleging, or not. To any settlement of that question the legal personal representative of the intestate was a necessary party. Shanmugan could not bind the estate, and unless it was to be bound by the participation in the transaction of the appellant in the character of attorney for the administrator, that transaction would not furnish a title enabling the appellant to obtain from Guan, as he did, first an assignment of the intestate's interest in L.W.H. and afterwards the shares in the limited company.

What took place, therefore, was a verbal assignment by the appellant, as attorney of the administrator, to himself, of property known to be his principal's. He was in a fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator. This is not a case in which a stranger has possessed himself of trust property under circumstances which make him bound by the trust and in which it is then necessary to inquire into his exact position with reference to the section under discussion or to the English doctrine of express trusts. The appellant here dealt with the property in a fiduciary capacity antecedent to such dealing, and the purpose for which it became vested in him must be found in the purpose for which that capacity was conferred upon him. The position is the same as if the administrator himself had vested the property in the appellant for the purposes of the administration instead of the appellant vesting it in himself by virtue of his powers as attorney. In the course of the arguments, their Lordships were necessarily referred to the decision of the Court of Appeal in England in *Soar v. Ashwell*. (1) Whatever limits may have to be observed in the application to the construction of this section in the Limitations Ordinance of the Straits Settlements of the English decisions as to express trusts, the reasoning of the Master of the Rolls and Bowen L.J. in that case afford ample support for the particular step in the present

(1) [1893] 2 Q. B. 390.

argument, which consists in referring the possession of the appellant to his antecedent fiduciary capacity.

It remains to consider whether the purpose for which the property became vested in the appellant was specific. If he is regarded in the light of a trustee for the administrator, the answer is obviously in the affirmative. But even if it was to administer the estate and account for the residue to the next of kin, the purpose was also specific. It was suggested in the argument on behalf of the appellant that the judgment of this Board delivered by Lord Buckmaster in *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh* (1) was an authority for the broad proposition that distribution under an intestacy is never a specific purpose. Their Lordships are not of that opinion. They concur in the explanation of that judgment given in *Lam Kin Sang v. Cheang Kok Sang* (2)—namely, that it only deals with the case where a specific trust has been declared on its face exhausting the fund, but, that trust being void in law, the fund has to be dealt with as upon an intestacy in contradiction of the purpose named.

There remain certain subordinate questions. It is unfortunate that to bring Shanmugan into the suit recourse was had to the misconceived procedure of a third party notice. The position was that if as between the appellant and Shanmugan the arrangements of July 16, 1915, and January 7, 1924, stand, the appellant has an equitable defence to the extent of the sum to which Shanmugan will be beneficially entitled out of the money for which the appellant is accountable. If, on the other hand, those arrangements are avoided for fraud, there is an equitable defence only to the extent of the \$18,000 which Shanmugan received under the latter arrangement. This latter result has been, in fact, achieved by the order of the Court made by consent of the parties though not relevant to the pleadings. It seems, however, to their Lordships that the issue of fraud on which it depends has never been regularly tried. It was only introduced by the pleading delivered by the third party and he was discharged from the action without being called upon to support his

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allegations, on the ground that the third party procedure was inapplicable. The issue is, however, relevantly raised in the action now pending in India, and, under the circumstances, the proper order in the present suit is that execution (except for costs and the amount of any expenses properly incurred by the plaintiff and his predecessor as administrators de bonis non) be stayed until the suit in India has been determined. The widow being dead and the daughters now apparently married, it appears prima facie that Shanmugan is the only person interested. The order must provide that the stay will become perpetual failing due prosecution of the litigation in India and there must be liberty to apply.

With regard to the inquiry directed by the order of the Court of Appeal to ascertain the highest value reached by a share in the L.W.H., Ltd., it appears from the written judgments delivered that it was left to be determined upon further consideration before a single judge whether the respondent could elect to take the value of the shares instead of the shares themselves and how that value was to be estimated. Their Lordships understand this question has been determined on further consideration and on appeal by the Court of Appeal. These orders are not before their Lordships in this appeal.

Their Lordships will duly advise His Majesty that the appeal be dismissed subject to a variation of the order of the Court of Appeal by the introduction of a stay of execution as already described. There will be no order as to the costs of the appeal.

Solicitors for appellant : *Lowe & Co.*

Solicitors for respondent : *Peacock & Goddard.*

[PRIVY COUNCIL.]

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ON APPEAL FROM THE SUPREME COURT OF HONG
KONG, APPELLATE JURISDICTION.

Hong Kong—Shipping—Collision—Fog—“Vessel the position of which is not ascertained”—Regulations for the Prevention of Collisions at Sea, art. 16.

In order that the position of a vessel whose fog-signal is heard by another vessel may be “ascertained” within the meaning of art. 16 of the Regulations for the Prevention of Collisions at Sea, the vessel must be known by the other vessel to be in such a position that both vessels can safely proceed without risk of collision. An inference as to the vessel’s position, based upon the direction from which the fog-signal was heard, the probable course which she is taking, and the improbability of her crossing the fairway in a fog, is not an ascertainment justifying a disregard of the precautions enjoined by the above article. Implicit obedience to the Regulations, upon which navigators are entitled to rely, is of great importance.

Observations of Barnes P. in *The Aras* [1907] P. 28, 34 referred to.

Appeal allowed.

APPEAL (No. 67 of 1933) from a judgment of the Supreme Court of Hong Kong, Appellate Division (August 15, 1932), affirming a judgment of Kemp C.J. (February 19, 1932).

A collision occurred in Hong Kong harbour on March 22, 1931, between the appellants’ steamship *Toyooka Maru* and the respondents’ steamship *Kiangsu*. The owners of each ship brought an action against the owners of the other in the Supreme Court of Hong Kong for damages; the actions were consolidated.

The trial judge, Kemp C.J., held that the *Toyooka Maru* was solely to blame. On appeal to the decision was affirmed

* *Present*: LORD ATKIN, LORD MACMILLAN, and LORD WRIGHT, with nautical assessors.

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by a majority (Grain and Wood JJ.); the Chief Justice, modifying his view at the trial, was of opinion that both ships were to blame.

The facts, and the material terms of art. 16 of the International Regulations for the Prevention of Collisions at Sea, appear from the judgment of the Judicial Committee.

1934. July 23, 24. *Noad K.C.* and *R. F. Hayward* for the appellants.

A. T. Miller K.C. and *K. S. Carpmael* for the respondents.

Dec. 4. The judgment of their Lordships was delivered by

LORD MACMILLAN. On March 22, 1931, a collision occurred in the harbour of Hong Kong between the appellants' steamship *Toyooka Maru* and the respondents' steamship *Kiangsu*. Each vessel blamed the other and cross-actions of damages, subsequently consolidated, were instituted by their respective owners against each other in the Supreme Court of Hong Kong. The trial judge, Sir Joseph Kemp C.J., found the *Toyooka Maru* solely to blame, and his decision was affirmed by the Full Court on appeal. There were, however, considerable divergencies of view among the learned judges below (and also apparently among the nautical assessors who assisted them) on certain aspects of the case. The learned Chief Justice, who sat as a member of the Appellate Court, altered the opinion which he had reached at the trial and was ultimately in favour of holding both vessels to blame.

The material facts are not complicated and are to a large extent common ground. It appears that the *Toyooka Maru* on the morning of the day in question left Kowloon Wharf outward bound shortly after seven o'clock. When she had proceeded some distance but was still within the harbour waters her master observed a bank of fog approaching from the N.E. She was then on the starboard or south side of the channel, being the proper side for an outgoing vessel. Her master, judging it unsafe to proceed in the fog, resolved to anchor, and as the local Ordinances forbade vessels to anchor in the fairway he decided to make his way to the

anchorage for foreign men-of-war, shown on the chart to the north of the fairway. To reach this he had to direct his course to the N.E. across the fairway and at 7.43 A.M. he altered his course accordingly. No incoming vessel had been seen by him. He gave the usual fog-signals by sounding prolonged blasts at short intervals. At 7.44 he heard an answering fog-signal apparently from a vessel at some distance on his starboard bow, and immediately stopped his engines. Several more fog-signals were interchanged between the vessels, and at 7.48 the master of the *Toyooka Maru*, which still had some way on, hearing a blast from the other vessel close on his starboard bow, ordered his engines full speed astern. At 7.49 the *Toyooka Maru* for the first time sighted the other vessel, which proved to be the *Kiangsu*, proceeding on a west north-westerly course at a distance of about 600 feet. A collision was then inevitable, and at 7.50 the port side of the *Kiangsu* about amidships struck and buckled over the stem of the *Toyooka Maru*. At the time of the collision the *Toyooka Maru* had reached the area marked as the anchorage for foreign men-of-war, and the collision occurred within the anchorage.

The *Kiangsu* was inward bound. She had entered the harbour waters through the Lyemun Pass at 7.35. At 7.44, as she was proceeding on the northern side of the channel, which was her proper side, she heard a fog-signal some points on her port bow, from a vessel which was invisible in the fog, and which subsequently proved to be the *Toyooka Maru*. She assumed that the vessel from which the signal came was outward bound and would be keeping to her own, the southern, side of the channel so that the vessels would pass port to port. The *Kiangsu* did not stop her engines but put them to slow, and after altering her course a point to starboard she proceeded on her way, sounding fog-signals at short intervals. The fog-signals from the other vessel were heard increasingly near and fine on the *Kiangsu's* port bow and at 7.49 the vessels, as already stated, became visible to each other for the first time. The *Kiangsu* put her engines full steam ahead and first ported and then immediately

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starboarded her helm so as to lessen the impact of the then inevitable collision. (The helm orders are in the old form throughout.)

The faults attributed to the *Toyooka Maru* are (1.) that she adopted a negligent and dangerous course in crossing the fairway in fog; (2.) that she failed, on hearing the *Kiangsu's* first fog-signal, to port her helm and resume the proper course for outgoing vessels on the south side of the channel; and (3.) that she failed to drop her anchors when she sighted the *Kiangsu* at 7.49. The faults attributed to the *Kiangsu* are (1.) that she acted in breach of art. 16 of the Regulations for Preventing Collisions at Sea by not stopping her engines on hearing the fog-signal from the *Toyooka Maru*; and (2.) that she proceeded at a dangerously high speed through the fog.

The learned Chief Justice at the trial found that the *Toyooka Maru* was to blame for having directed her course across the fairway in fog and also in not having dropped her anchors on sighting the *Kiangsu*. He further found that the *Kiangsu* in not stopping her engines at latest at 7.47 had acted in breach of Regulation 16 and he held (erroneously, in view of s. 4, sub-s. 1, of the Maritime Conventions Act, 1911) that the onus of showing that this breach did not contribute to the collision was thereby imposed on her. In his opinion "she obviously failed to discharge that onus." He nevertheless held the *Toyooka Maru* solely responsible for the collision on the ground that she mainly contributed to the accident by crossing the fairway in fog and that by dropping her anchors she could have avoided the collision at the last moment, whereas the default of the *Kiangsu* was minor in degree and was due merely to an error of judgment in the "ambiguous position created by the *Toyooka Maru*." He absolved the *Kiangsu* from the charge of excessive speed. As already indicated, the learned Chief Justice when sitting in the Full Court on appeal modified his original view and was in favour of holding both vessels to blame. Sir Peter Grain in the Full Court was of opinion that the *Toyooka Maru* was wholly to blame on account of her having crossed the fairway in fog and also on account of her not having altered

her course to starboard when she heard the *Kiangsu's* second blast and knew that the *Kiangsu* was an incoming ship. He further held that the *Kiangsu* was not in breach of Regulation 16. Wood J. took the same view, while also holding that the *Toyooka Maru* was not to blame for not dropping her anchors when she first saw the *Kiangsu*.

The *Toyooka Maru* having been found by concurrent judgments in the Courts below to have been at fault in crossing the fairway in fog, their Lordships accept this finding, from which they see no reason to differ, and they therefore find that the *Toyooka Maru* was to blame for the collision. But there remains the question whether she was solely to blame or whether the *Kiangsu* was also to blame. This question their Lordships now proceed to consider.

The critical point for determination is whether the *Kiangsu* was or was not in breach of Regulation 16. That Regulation provides in its second paragraph that: "A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The *Kiangsu* admittedly heard apparently forward of her beam the first fog-signal of the *Toyooka Maru* at 7.44 and also the subsequent fog-signals, and admittedly she did not stop her engines either at 7.44 or at any time before the collision. Her argument is that the Regulation did not apply, because the fog-signals which she heard were those of a vessel the position of which was "ascertained," inasmuch as when she heard the first fog-signal she judged the vessel from which it emanated to be an outward bound vessel and thus "ascertained" her position to be on the south side of the channel, the proper side for an outgoing vessel. Sir Peter Grain states that counsel for the appellants admitted, and that it was in fact admitted by all, that as far as the captain of the *Kiangsu* was concerned the *Toyooka Maru* was an "ascertained" vessel up to 7.47, when her signals became nearer and finer on the *Kiangsu's* port bow.

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Their Lordships doubt the justification of this admission, but accepting it they have still to consider whether during the three minutes from 7.47 to 7.50, when the collision took place, the *Toyooka Maru* was a vessel whose position had been ascertained by the *Kiangsu*. The learned Chief Justice at the trial and when sitting in the Full Court on appeal was of opinion that from 7.47 "at latest" the position of the *Toyooka Maru* was not ascertained by the *Kiangsu*. Sir Peter Grain and Wood J. were both of opinion that the *Toyooka Maru*'s position was throughout "ascertained" on the ground that the *Kiangsu* was entitled to assume that she was an outward bound vessel whose position was necessarily on the southern side of the channel. Their Lordships do not agree with the view taken by the majority of the Full Court. The position of the *Toyooka Maru* was not, in their Lordships' opinion, "ascertained" within the meaning of the Regulation. It was inferred, not ascertained, and as it turned out the inference was wrong. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty, but in the present case the only data were that the fog-signals were heard on the *Kiangsu*'s port bow, that outward bound vessels keep to the south side of the channel and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision: see, e.g., per Sir Gorell Barnes P. in *The Aras*. (1) The *Kiangsu* did not know the position of the *Toyooka Maru* in this sense; she inferred it and took the chance of her inference being right.

Then it was pointed out that the Regulation is further qualified by the words "so far as the circumstances of the case admit" and it was suggested that the *Kiangsu*, inward

bound with the tide behind her, could not safely have stopped her engines in the fairway and lost steerage way. Their Lordships are satisfied that the *Kiangsu* entirely failed to establish that the circumstances did not admit of her stopping her engines.

The result is that their Lordships are of opinion that the *Kiangsu* was in breach of Regulation 16 by reason of her failure to stop her engines, if not when she first heard the *Toyooka Maru's* fog-signal at 7.44, at any rate from and after 7.47, when she heard the *Toyooka Maru's* further fog-signals. This is also the view of the nautical assessors who assisted their Lordships at the hearing, and who advised that the *Kiangsu* ought to have stopped her engines when she heard the first fog-signal of the *Toyooka Maru* at 7.44.

In view of this grave breach of the Regulation on the part of the *Kiangsu* she cannot be absolved from a share in the blame for the collision. Their Lordships cannot too emphatically express their sense of the importance of implicit obedience to the Regulations, on whose observance navigators are entitled at all times to rely. If a vessel unjustifiably takes the risk of disregarding one of their injunctions, as the *Kiangsu* did on this occasion, she must suffer the consequences. In the whole circumstances their Lordships are of opinion that both vessels should be held equally to blame.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Chief Justice of February 19, 1932, and of the Full Court of August 15, 1932, be reversed and the case be remitted to the Supreme Court of Hong Kong with a direction to find the *Toyooka Maru* and the *Kiangsu* both equally to blame for the collision and to dispose of the consolidated actions, including the costs in the Courts below, in accordance with this finding.

The appellants having been in part successful and in part unsuccessful before their Lordships, will have one-half of their costs of the appeal.

Solicitors for appellants : *Waltons & Co.*

Solicitors for respondents : *Botterell & Roche.*

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In re REFUND OF DUES PAID UNDER s. 47 (f) OF THE
 TIMBER REGULATIONS IN MANITOBA, BRITISH
 COLUMBIA, SASKATCHEWAN AND ALBERTA.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Crown Lands—Homesteads—Timber cut by entrants—Refund of dues paid—Whether obligation of Dominion or Province—Construction of agreements—Timber Regulations (made under Dominion Lands Act), s. 47 (f).

Sect. 47 (f) of the Timber Regulations, made under the Dominion Lands Act (R. S. Can., 1927, c. 113), required the holder of an entry for a homestead to pay dues upon timber cut and sold by him to persons who were not actual settlers, but provided that the dues paid should be refunded upon the entrant obtaining a patent for the homestead. Subsequently agreements were made, and obtained statutory effect in 1930, whereby the Dominion transferred the Crown lands in Manitoba, British Columbia, Saskatchewan, and Alberta to those respective Provinces. The agreements each provided that the transfer should be subject to any trust existing, and to any interest other than that of the Crown, in respect of the lands; that any payments already received by the Dominion in respect thereof should continue to belong to the Dominion; and that the Province would carry out every contract to purchase or lease the land transferred, and "every arrangement whereby any person has become entitled to any interest therein as against the Crown":—

Held, that the obligation to refund the dues was an "arrangement" within the above cited words of the agreements, and that accordingly it was binding upon the respective Provinces.

Judgment of the Supreme Court of Canada [1933] S. C. R. 616 affirmed on the above point.

APPEAL (No. 36 of 1934) by special leave from a judgment of the Supreme Court of Canada (October 3, 1933) upon a reference to that Court under s. 55 of the Supreme Court Act.

The reference was as to the effect of agreements (confirmed by the British North America Act, 1930) under which the Dominion transferred to the appellants Provinces severally

* *Present*: LORD BLANESBURGH, LORD THANKERTON, LORD WRIGHT, LORD ALNESS, and SIR LANCELOT SANDERSON.

the administration of undisposed of Crown lands within their respective boundaries. The questions referred are set out in the judgment, pp. 187, 188 post. The judgment of the Supreme Court was delivered by Duff C.J. In answer to the first question, the Court held that the obligation to refund dues paid subject to refund under s. 47 (f) of the Timber Regulations, made under the Dominion Lands Act, was upon the Provinces respectively, not upon the Dominion. In answer to the second question, with which the Judicial Committee did not find it necessary to deal, the Court held that if the answer to the first question had been in the opposite sense the Dominion would have been entitled to recoupment. The proceedings in the Supreme Court are reported at [1933] S. C. R. 616.

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1934. Nov. 26, 27. *Stuart Bevan K.C.* and *Wilfrid Barton* for the appellants, the Attorneys-General for the above-named Provinces.

Sir William Jowitt K.C. and *W. Stuart Edwards K.C.* for the respondent, the Attorney-General for Canada.

1935. Jan. 17. The judgment of their Lordships was delivered by

LORD WRIGHT. This is an appeal by special leave from a judgment of the Supreme Court of Canada given under a reference from the Governor-General-in-Council.

The Order of Reference was in the following terms, which it is here convenient to set out in full: "The Committee of the Privy Council have had before them a report, dated April 27, 1933, from the Acting Minister of Justice, with reference to the provisions of the regulations governing the granting of yearly licences and permits to cut timber on Government lands in Manitoba, Saskatchewan, Alberta, within twenty miles on either side of the Canadian Pacific Railway in the Province of British Columbia, and the tract of three and a half million acres controlled by the Government of the Dominion in the Peace River District in the Province of British Columbia (hereinafter referred to as the Timber

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Regulations), established by Order in Council of March 26, 1924, and subsequent amending Orders in Council, under the authority of s. 57 of the Dominion Lands Act, ch. 113, R. S. C. 1927, and duly published in the "Canada Gazette" and validated in respect of non-compliance with the provisions of s. 75 of the said Act by ch. 44 of the Statutes of Canada, 1928; and in particular to the provisions of paras. (e) and (f) of s. 47 of the said regulations, which read as follows:—

'(e) Any holder of an entry for a homestead, a purchased homestead or a pre-emption, who, previous to the issue of letters patent, sells any of the timber on his homestead, purchased homestead or pre-emption, to owners of sawmills or to any others without having previously obtained permission to do so from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner provided in the Dominion Lands Act. (f) If the holder of an entry as above described desires to cut timber on the land held by him, for sale to either actual settlers for their own use or to other than actual settlers, he shall be required to secure a permit from the Crown timber agent in whose district the land is situated, and shall pay dues on the timber sold to other than actual settlers at the rate set out in s. 42 of these regulations, but the amount so paid shall be refunded when he secures his patent.'

"The Minister states that, prior to the coming into force of the several agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan, respectively, whereby provision was made for the transfer to the said Provinces, respectively, on the terms and conditions therein set forth, of the natural resources therein described (which said agreements were confirmed and given the force of law by the British North America Act, 1930, 20 & 21 Geo. 5, c. 26 (Imp.)), permits to cut timber were, pursuant to the terms of para. (f) of s. 47 of the Timber Regulations, granted to entrants for homesteads, purchased

homesteads, or pre-emptions on Dominion lands within the several Provinces aforementioned, and dues required to be paid as by the said regulation provided were paid by the permittees to the Dominion Government, subject to the term or condition that the dues so paid should be refunded to the permittee when he had secured a patent for the land for which he had made entry.

“ The Minister further states that many such permits were outstanding and in force at the time the several agreements with the Provinces aforementioned came into force ; that a large number of the holders of such permits subsequently became entitled to, and received, patents for the lands in respect of which they had made entry, from the Crown in the right of the Province within which such lands are respectively situate, and, thereupon, having thus become entitled to a refund of dues paid under the terms of s. 47 (f) of the Timber Regulations, made application for such refund of dues either to the Provincial Government concerned or to the Dominion Government ; that a question has arisen between the Dominion Government and the Government of each of the Provinces aforementioned whether the obligation to make the refund of dues in such cases is, under the terms of the several agreements aforementioned, an obligation of the Provincial Governments, respectively, or of the Dominion Government, and that it is expedient that appropriate action should be taken at once to obtain a judicial determination of this question to the end that settlers, who are now admittedly entitled to a refund of such dues from either the Province or the Dominion, may be afforded relief in that regard, by the responsible Government, at an early date.

“ The Committee, on the recommendation of the Acting Minister of Justice, advise that Your Excellency in Council be pleased, under and in pursuance of the provisions of s. 55 of the Supreme Court Act, R. S. C. 1927, c. 35, to refer to the Supreme Court of Canada for hearing and consideration the following questions :—

(a) Under the terms of the several agreements aforementioned, is the obligation to refund dues, pursuant to the terms

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of para. (f) of s. 47 of the Timber Regulations, in the cases aforementioned, an obligation of the Dominion or of the respective Provinces?

(b) If the obligation be that of the Dominion, is the Dominion entitled to be recouped by the Provinces respectively, the amount of the dues so refunded?"

The Supreme Court answered the questions as follows:—

"To the Interrogatory numbered one: The said obligation is an obligation of the respective Provinces; To the Interrogatory numbered two: In view of the answer to interrogatory one, this question does not arise; but, if our view had been that the Provinces were not under a direct obligation to refund, we should have considered that the Dominion, on refunding such dues, would be entitled to recoupment from the Province concerned."

The decision of the appeal depends on the construction of the terms of the several agreements between the Dominion and the Provinces specified in the order of reference, but before their terms can be considered it is necessary to examine the provisions of the Dominion Lands Act and of the Timber Regulations in so far as they relate to the position of entrants for homesteads. These provisions were passed by the Dominion Legislature while the administration of Crown lands in the four Provinces was vested in the Dominion: in the case of the Provinces of Manitoba, Alberta and Saskatchewan, Canada had retained these lands when these Provinces were constituted in 1870 and 1905: in the case of British Columbia the lands in question called the Railway Belt and the Peace River Blocks had been transferred by that Province to the Dominion for the purpose of constructing the railway. The four agreements were for the transfer or re-transfer of the lands to the respective Provinces.

The provisions of the Dominion Lands Act, so far as they are material to this appeal, are those which dealt with what is called "Homestead Entry." By s. 11, sub-s. 1, British subjects or intending British subjects were empowered to make application for entry for a homestead; if that application

were accepted on payment of the prescribed fee, the receipt given by the local agent of the Government was to be a "certificate of entry," entitling the recipient to take, occupy, use and cultivate the land entered for, and to hold possession thereof to the exclusion of any other person, and to bring and maintain actions for trespass committed on the land. These rights, however, were subject to the proviso that occupancy, use and possession of land should be subject to the provisions of the Act or of any other Act affecting it, or of any regulations made thereunder (s. 11, sub-s. 2). By s. 11, sub-s. 6, it was provided that an entry for a homestead should be for the sole use and benefit of the entrant, failing which the Minister should have a discretion to cancel the entry. An entrant was bound to perfect his entry by taking up possession of the land and beginning residence thereon within six months from the date of the certificate, failing which the entry was liable to be cancelled; it might also be cancelled if the entrant in any year failed to fulfil the requirements of the Act. The area for which entry was granted was one not exceeding 160 acres. At the end of three years, the entrant might be granted letters patent for the land, which thereupon vested in the entrant in fee simple. Before, however, letters patent could be issued the entrant was required to have fulfilled certain conditions, and in particular to have erected a habitable house on the plot and to have cultivated such an area of land in each year as to satisfy the Minister.

It is unnecessary here to recapitulate the numerous provisions of the Act in detail on this matter. It is clear that the object of the homestead system was to encourage settlement and cultivation as arable land, though by s. 27 in certain cases the land might be used for raising stock.

Except for s. 15, sub-s. 4, which enabled the Minister to cancel an entry for land within six months if the land were ascertained to be valuable on account of merchantable timber, that part of the Act which dealt with "Disposal of Lands," and included the provisions with reference to homestead entries, did not specify what were to be the entrant's rights

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in regard to timber. Another division of the Act, headed "Disposal of Timber," dealt with the disposal by the Government by public competition of the right to cut timber on berths not exceeding in area 25 square miles. By s. 57 it was provided that the Governor-in-Council might make regulations for the issue of permits to cut timber (*inter alia*) (*a*) to actual settlers for use for building purposes on their farms or for fuel for themselves, (*b*) for sale as cordwood, and also to other classes of persons and for other objects. As appears from the order of reference quoted above, the regulations which are here relevant are there treated as made under s. 57, that view is accepted by the Supreme Court, though the Court is disposed in the alternative to hold that the Regulations in question are valid under s. 74 (*k*), which empowered the Governor-in-Council "to make such orders as are deemed necessary to carry out the provisions of this Act, according to their true intent and to meet any case which arises and for which no provision is made in this Act." Their Lordships do not, however, consider the question whether or not the regulations are valid, to be open for discussion in this case; they must, however, point out that they would feel great difficulty in holding that the relevant regulations could validly be made under s. 57, sub-ss. 1 or 2, though they are inclined to think that they might be justified under s. 74 (*k*). But it is not here necessary for their Lordships or, indeed, competent for them, to express any decided opinion on the point. They, however, are disposed to read s. 57 (*a*) as referring to the cutting of timber by actual settlers, on Dominion land other than their own holdings, and they think it even clearer that s. 57, sub-s. 2 (*b*), relates to timber on outside land.

On this view, then, there is no reference in the Act to the powers (if any) of an entrant in regard to timber on his land until the part of the Act which is headed "Summary proceedings respecting forfeiture and trespass." Under that heading there is (*inter alia*) s. 103, which is in these terms: "103. Any holder of an entry for a homestead who previous to the issue of the letters patent, sells any of the timber on

his homestead to owners of sawmills or to any others than settlers for their own exclusive use, without having previously obtained permission so to do from the Minister, is guilty of a trespass and may be prosecuted therefor before a justice of the peace, and, upon summary conviction, shall be liable to a penalty not exceeding one hundred dollars, and the timber so sold shall be subject to seizure and confiscation in the manner hereinbefore provided."

It is now convenient to turn to the regulations, which in terms are described as governing the granting of yearly licences and permits to cut timber on Dominion lands. These are complicated regulations, but only regulations 47 (e) and (f) are relevant to this inquiry or affect homestead entrants. On comparing regulation 47 (e) with s. 103 of the Act, it appears that they do not textually agree, as the Supreme Court seem to have thought; 47 (e) does not, as s. 103 does, qualify "any others" by adding the words "than settlers for their own exclusive use"; but that difference is not here material, since, as already explained, the validity of 47 (e) is not in question.

Before considering the effect of regulations 47 (e) and (f), which have already been set out in full in the order of reference quoted above, it may be useful to consider what is the position of the entrant between the date of his entry and the time at which in virtue of the letters patent he becomes owner in fee of the plot. The transaction under which he acquires his right as entrant is not easy to bring under the precise description of contract. In one aspect the terms of the Dominion Lands Act and the regulations may be regarded as constituting an invitation to qualified persons to tender, so that a qualified applicant by making an application and tendering the fee, makes an offer which the Government, by giving the receipt, accepts; thus there is the consensual element which justifies the application of the term "arrangement" even if the term "contract" is not strictly appropriate. The holder of the entry becomes bound, at least on acquiring possession, to fulfil the terms of the statute and in particular becomes subject under s. 2 of the

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Act in regard to his use, occupancy and possession of the land to the provisions of the Act or any other Act affecting it or of the regulations made thereunder. The rights thus acquired by the holder seem to fall within the language of this Board in *Glenwood Lumber Company v. Phillips* (1): "If the effect of the instrument" [or here the transaction] "is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

But whether properly described as a demise or not, the holder does acquire an interest or estate in the land, subject to conditions. He acquires the use and occupation for purposes of cultivation and is bound to cultivate, unless the case falls within s. 27. But until the letters patent are granted the freehold is in the Crown; and standing timber is part of the freehold. Thus in *Bewick v. Whitfield* (2) Talbot L.C. said: "The timber, while standing, is part of the inheritance; but whenever it is severed, either by the Act of God or by tempest, or by a trespasser and by wrong, it belongs to him who has the first estate of inheritance whether in fee or in tail, who may bring trover for it."

Lord Talbot had in mind the case of a tenant for life, but the principle is applicable to tenants generally. In the Act timber is defined as meaning "trees standing, fallen or cut." Sect. 103 of the Act and regulations 47 (e) and (f) show clearly that there are limits to the powers granted to entrants dealing with timber. It is clear that wrongfully to cut timber constitutes trespass, and hence that term is used to describe the wrongful act in s. 103, and regulation 47 (e), at least in regard to timber wrongfully cut, which remains the property of the Crown, as is expressly provided in the analogous cases under s. 63. It is not specified in the Act on regulations what use an entrant may properly make of timber on his lot, though it is agreed that he is impliedly entitled to cut it to clear the ground, or to use as fuel, or to build the house which under s. 16 he is bound to build as

(1) [1904] A. C. 405, 408.

(2) (1734) 3 P. Wms. 267.

a condition of being granted letters patent, or to provide fencing and so forth. But regulation 47 (e) debars him from selling it, save under a permit, and regulation 47 (f) forbids him to cut timber on the land for sale without a permit, save as provided, and imposes on him an obligation to pay dues on timber sold in accordance with the terms set out in the regulations. These regulations accordingly constitute restrictions on the rights conferred by the certificate of entry; by s. 11, sub-s. 2, the entrant has undertaken to be bound by these restrictions, and they are accordingly terms of the transaction under which the entrant has become entitled to his interest in the plot against the Crown; equally are the terms which bind the Crown, such as the obligation to refund sums paid, terms of that transaction.

But in addition, the right to cut for sale and sell such timber off the land on paying the prescribed dues under regulation 47 (f) is itself not merely a licence, but an interest in lands. The distinction between a licence and a grant is clearly stated by Romer L.J. in *Frank Warr & Co. v. London County Council* (1), where citing *Thomas v. Sorrell* (2), he distinguishes "a licence properly so called" from "a right in the nature of a profit à pendre, i.e., to take something out of the soil," which is matter of grant: the latter case he illustrates by the instance of a permission not merely to cut down a tree on a man's ground, but to carry (or have it carried) away.

In their Lordships' judgment, the dues were paid for the right to sell off the land, which was the property of the Crown, the trees which could not be lawfully either cut for sale or sold off the land without permission. Hence the dues were paid in respect of an interest in the land—that is, in respect of the trees which till cut were part of the freehold and in respect of their sale off the land. All this without the permit would have been a wrongful act or trespass. The contingent obligation on the Crown to refund was an integral part of the transaction.

It has been necessary to define the position of the entrant

(1) [1904] 1 K. B. 713, 721.

(2) (1674) Vaugh. 330, 351.

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in order to deal with the questions of construction, on which depends the answer to the questions referred. These questions of construction arise on four separate contracts made between the Dominion on the one hand and the four several Provinces on the other. These contracts were all of the same character; in each case the Dominion undertook to transfer (or in the case of British Columbia to re-transfer) the Crown lands to the Province respectively in question; each agreement contained a number of detailed provisions not here material, and also contained certain financial terms under which annual sums were to be paid by the Dominion to the Province.

The provisions directly relevant to this appeal are substantially identical in the four agreements. Those contained in clauses 1 and 2 of the Manitoba agreement, may be taken as typical and are as follows: "1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of s. 109 of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and

that the Province shall not be liable to account to Canada for any such payment made thereafter.

"2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any term of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto."

The respondent contends that under these clauses the Dominion is entitled to retain the payment made to the Dominion under regulation 47 (f), but that the Province is bound to refund any amounts which may become due under the same regulation to an entrant when he secures his patent. These contentions involve two main propositions: (1.) that dues paid to the Dominion under the regulations constitute payments within clause 1 in respect of lands within the Province falling within the agreement, and (2.) that the holder of an entry acquires his position under an arrangement whereby he becomes entitled to an interest in Crown lands in the Province as against the Crown or further or alternatively that a permit and payment of dues under regulation 47 (f) is in itself such an arrangement. From these propositions it follows, it is contended, that under clause 1 the Dominion is entitled to retain without being liable to account to the Province all such payments, made before the coming into force of the agreement, but that under clause 2 the Province is bound to refund the amounts so paid by an entrant to him when he secures his patent, as being necessary to carry out the terms of such an arrangement as clause 2 specifies.

The Supreme Court has accepted these contentions as well founded, and their Lordships agree with the Supreme Court.

The appellants have argued that the dues so paid were

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merely deposits which the Dominion received and held simply as stakeholders subject to an obligation to refund in specie ; hence it was contended, they could never be correctly described as payments which ever belonged or could continue to belong to the Dominion, the obligation to refund attached it was said to the specific moneys paid ; it was " the amount so paid " that was to be refunded and accordingly the hand which received was the hand to refund. Their Lordships, agreeing with the Supreme Court, do not accept these arguments. The dues when paid were in no sense impressed with a trust ; they were paid so that they should belong to, or become the property of, the Dominion ; there simply attached to the Dominion on payment a contingent personal obligation to refund a corresponding amount if or when an entrant secured his patent. The express words of the clause " continue to belong " cannot, in their Lordships' judgment, fairly be construed as importing a continuance of anything beyond the mere fact of " belonging," and the express words that the Dominion were not to be " liable to account " also import the intention that the payments so received were to be put out of any future account between the Dominion and the Province. In effect a sharp line was to be drawn at the date at which the agreement should come into force ; any such payments before that date were to be deemed to be for account of the Dominion, and any payments subsequently were to be for account of the Province. This construction is also supported by the words " whether in advance or not."

Clause 1 having thus dealt with the position that there was to be no accounting on either side for payments received according as the several payments fell either before or after the coming into force of the agreements ; clause 2 dealt with liability to carry out obligations in respect of Crown lands in the respective Province. The appellants have contended that neither the original entry nor the securing of rights under regulation 47 (f) can be described as " any other arrangement, etc.," within clause 2 ; in any event they further contended that what was to be carried out by the Province was limited to obligations such as the granting of

letters patent to entrants or the fulfilling of obligation in respect of actual lands, such as trusts or onerous covenants. Their Lordships do not agree with either contention. The words "every other arrangement, etc.," following on the words "every contract to purchase or lease any Crown lands" seem singularly apt to describe the complex transaction under which an entrant was admitted, and one of the terms under which he was admitted was that if he had to pay dues under regulation 47 (f) he should be entitled to have them refunded. These were terms which had to be carried out by the Dominion before the transfer of the lands to the Province, and accordingly are to be carried out by the Province after the transfer. The word "arrangement" is as Parke B. said in *Manning v. Eastern Counties Ry. Co.* (1) "a very wide and indefinite one." Their Lordships need not repeat what they have already said above in explaining their conclusion that there was in each such case not simply an arrangement, but an arrangement whereby the entrant became entitled to an interest in land. Equally, for reasons already stated, the actual payment of dues under regulation 47 (f) constituted such an arrangement, which, if occasion arises, must be carried out in accordance with its terms by refunding the appropriate amounts.

It may seem at first sight unfair that the Province should refund amounts which the Dominion has received, but it must be remembered that this is only one term in a complicated agreement which contains other financial readjustments; it may well have appeared convenient to the parties to avoid all further cross accounts and draw a hard-and-fast line at the date at which the agreement should come into force. In any case their Lordships think that this conclusion results from the true construction of the words of the agreement.

On this basis it follows that the obligations in question are as between the Dominion and the Provinces, obligations falling on the Province. There remains the question whether the right of an entrant to claim against the Dominion to be refunded, has been in any way affected. It is clear that the

(1) (1843) 12 M. & W. 237, 253.

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agreement in itself in no way binds the entrant : he is not a party to it and so far his rights have not been in any way affected. Nor does the fact that the agreement has in each case been confirmed by the British North America Act, 1930, which enacts that these agreements shall have the force of law, necessarily change the position. The entrant is, quoad his claim to be refunded, in the position of a creditor, and a creditor is not in law (except in a few cases such as bankruptcy) compellable to accept as his debtor any other person than the original debtor unless he so agrees. If he does so agree, there is a novation, that is, a new contract, under which the original debtor is discharged and a new debtor substituted in his place. But their Lordships agree with the Supreme Court that in the special circumstances of this case the statute of 1930 did effect such a novation. Under clause 2 it is the Province, to which the lands have been transferred, that can alone as a matter of law thereafter grant the patent to an entrant ; the agreement, made law by the Act of 1930, requires the Province to carry out the various specified obligations in respect of the lands transferred ; these obligations are now imposed on the Province by law ; by the same reasoning they do not any longer attach to the Dominion ; that implies that by law the entrant must go to the Province to obtain the carrying out of the various obligations which the statute of 1930 by confirming the agreement requires the Province to fulfil. It follows that even vis-à-vis the entrant the obligation has by force of the law become the obligation of the Province. Thus there is effected by force of the law what may be called a statutory novation.

If that were not so, the entrant would retain his claim as against the Dominion, while the Dominion, on settling the claim, would be entitled to be recouped by the Province. But that position, though perhaps not different in the final incidence of the burden, is obviously much less convenient. Nor is the decision now arrived at likely to prejudice the entrant. In any case he is bound by law.

In the result their Lordships are of opinion that the

question numbered one should be answered as it was by the Supreme Court, the question numbered two therefore not arising, and that the appeal should be dismissed. In accordance with the usual practice in such cases there will be no order as to costs. They will humbly so advise His Majesty.

Solicitors for appellants : *Gard, Lyell & Co.*
Solicitors for respondent : *Charles Russell & Co.*

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Poor Law (Settlement)—Illegitimate Child—Adoption Order—Removal Order—Settlement of Adopter—Adoption of Children Act, 1926 (16 & 17 Geo. 5, c. 29), s. 5—Poor Law Act, 1930 (20 Geo. 5, c. 17), ss. 85, 86, 93.

By s. 93, sub-s. 4, of the Poor Law Act, 1930: "No child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal of the child, from the county or county borough in any case where the father, mother, stepfather, stepmother or reputed father may not lawfully be removed therefrom."

By s. 86, sub-s. 1, of the same Act: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough."

By s. 85, sub-s. 1, of the same Act: "Until a person acquires a settlement of his own . . . that person—

(a) if a legitimate child, shall take and follow, up to the age of sixteen, the settlement of his father, or, if and so long

* *Present* : LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD WRIGHT.

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as his father has no settlement, the settlement which his mother had immediately before her marriage to his father, but if after the death of the father the mother acquires a settlement (not being a derivative settlement) shall take and follow, up to the age of sixteen, that settlement;

(b) if an illegitimate child, shall take and follow, up to the age of sixteen, the settlement of his mother;

and shall in either case retain the settlement which, under the foregoing provisions of this section, he had at the age of sixteen "

.....

By s. 5, sub-s. 1, of the Adoption of Children Act, 1926: "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock: Provided," etc.

W. W. H. was born an illegitimate child in the county of Leicester and lived with a foster-mother in the county borough of Leicester until he was eleven years of age. He was then, by an order under s. 1 of the Adoption of Children Act, 1926, adopted by one C. H. W. and his wife, with whom he lived continuously for four years in the county borough of Leicester, from which place the adopters were irremovable and in which they were settled at the date of the order. A few days after he had reached the age of sixteen years the child became chargeable to the county of Surrey. The justices of Surrey ordered his removal to Coventry, where his mother was then last settled:—

Held, that the order for removal must be quashed, for that the removability and settlement of a poor person are matters relating to his custody, maintenance and education; that therefore the rights, duties, obligations and liabilities of the mother in relation thereto were extinguished and vested in the adopter as though the child was a child born to the adopter in lawful wedlock, in which case the child could not be removed to the place of settlement of his mother.

Order of the Court of Appeal [1934] 1 K. B. 211 reversed.

Order of Divisional Court [1933] 2 K. B. 384 restored.

Ward v. Dorman, Long & Co. [1933] 2 K. B. 658 overruled.

APPEAL from an order of the Court of Appeal (1) allowing an appeal from an order of the King's Bench Division (2)

(1) [1934] 1 K. B. 211.

(2) [1933] 2 K. B. 384.

upon a special case stated under s. 11 of the Quarter Sessions Act, 1849, in an appeal to the General Quarter Sessions of the Peace in and for the county of Surrey from an order of two justices of the said county dated September 15, 1932, adjudging the City and County Borough of Coventry to be the last legal settlement of Wilfred Wilton Hall, hereinafter called "the poor person," and ordering him to be removed thereto.

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The special case stated the following facts :—

The poor person was born on July 16, 1916, at Ashby-de-la-Zouch in the county of Leicester and was the illegitimate child of Lucy Hall, who since the year 1925 has continued to be, and still is, irremovable from and was last settled in the City and County Borough of Coventry. The poor person has not resided with the said Lucy Hall since August, 1916.

From August, 1916, to February, 1927, the poor person resided with a foster-mother in the City and County Borough of Leicester. From February, 1927, to October 29, 1931, the poor person resided continuously and without interruption at 33 Arundel Street in the City and County Borough of Leicester with Charles Herbert Wall and Martha Ann Wall. On November 25, 1927, an order was made by a justice of the peace for the City of Leicester under the Adoption of Children Act, 1926, authorizing the said C. H. Wall and M. A. Wall, hereinafter called "the adopters," jointly to adopt the poor person. From November 25, 1927, to October 29, 1931, the poor person resided without interruption at 33 Arundel Street aforesaid with the adopters. From a date earlier than November 27, 1927, the adopters continued to be and still are irremovable from the City and County Borough of Leicester, and are now settled therein.

From October 29, 1931, till July 26, 1932, the poor person was an inmate of the Gordon Boys' Home at Woking in the county of Surrey. On July 26, 1932, he became chargeable to that county.

On September 15, 1932, the order in question was made for the removal of the poor person to the City and County Borough of Coventry as above stated.

H. L. (E.) On the hearing of the special case the King's Bench Division (Lord Hewart C.J. and Avory and Humphreys JJ.) allowed the appeal and quashed the order of September 15, 1932. (1)

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The Surrey County Council appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.), following *Ward v. Dorman, Long & Co.* (2), reversed the decision of the Divisional Court and allowed the appeal and ordered that judgment be entered at Quarter Sessions in favour of the Surrey County Council (3).

The Coventry Corporation appealed to this House.

1934, June 28. *J. F. Eales K.C.* and *H. W. Wightwick* for the appellants.

R. M. Montgomery K.C. and *W. B. Manley* for the respondents.

The arguments of counsel appear from the judgment of Lord Atkin.

June 29. The House took time for consideration.

July 19. LORD ATKIN. My Lords, the question in this case arises as to the settlement of a boy over the age of sixteen. The salient facts are that the boy was illegitimate. He was born in 1916 in the county of Leicester. He has not lived with his mother since a month after his birth. Her settlement is now in Coventry. In November, 1927, he was adopted by Mr. and Mrs. Charles Herbert Wall, of Leicester, in pursuance of an adoption order duly made under the Adoption of Children Act, 1926. From that date he resided with his adopted parents until October, 1931, when he appears to have left them, and in July, 1932, after attaining the age of sixteen, became chargeable to the county of Surrey. Surrey was clearly not his place of settlement, and the question arose whether he was settled at Coventry, as the settlement of his mother, or at Leicester, as a settlement acquired by himself by residence with his adopted parents. The justices decided for Coventry and made a removal order accordingly; the King's Bench Division on a case stated

(1) [1933] 2 K. B. 384. (2) [1933] 2 K. B. 658.

(3) [1934] 1 K. B. 211.

decided for Leicester; the Court of Appeal restored the decision of the justices. H. L. (E.)

My Lords, I am very clearly of opinion that the decision of the Divisional Court was right. The dispute arises as to the effect of the provisions of the Adoption of Children Act, 1926, on the sections of the Poor Law Act, 1930, dealing with settlement. It is unnecessary to remind your Lordships that settlement is a kind of Poor Law domicile; and that it is to the Poor Law authorities of the place of settlement that a poor person is ultimately chargeable. The Poor Law Acts have from time to time enacted and varied rules for ascertaining the settlement of persons; the law is now contained in the consolidating Act, the Poor Law Act, 1930. The Act reproduces the effect of previous statutes passed before the Adoption of Children Act, 1926, came into force. It will be convenient first to state the provisions of the Poor Law Act which come into the controversy; and then consider the effect of the Adoption of Children Act.

The respondents, who appear on the record as the County Council of Surrey but in fact represent Leicester, rely upon s. 85, sub-s. 1, of the Poor Law Act, 1930, which provides that "Until a person acquires a settlement of his own . . . that person . . . (b) if an illegitimate child shall take and follow, up to the age of sixteen, the settlement of his mother; and shall . . . retain the settlement which . . . he had at the age of sixteen." This person, it is said, was an illegitimate child; he took and followed up to sixteen the settlement of his mother; that settlement, when the boy reached sixteen, was Coventry; Coventry, therefore, at the date of the removal order was the boy's settlement.

The appellants, who represent Coventry, say that s. 85, sub-s. 1, applies only until a person acquires a settlement of his own: and that in pursuance of s. 86, sub-s. 1, and s. 93, sub-s. 4, the boy had acquired a settlement of his own at Leicester. By s. 86, sub-s. 1: "Where a person has resided for the term of three years in a county or county borough in such manner and in such circumstances in each of those years as would, in accordance with the provisions contained

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in this Act, render him irremovable, he shall be deemed to be settled in that county or county borough." By s. 93, sub-s. 4 : "No child under the age of sixteen residing in a county or county borough with his father, mother, stepfather, stepmother or reputed father shall be removed, nor shall any order be made for the removal of the child, from the county or county borough in any case where the father, mother, stepfather, stepmother or reputed father may not lawfully be removed therefrom." It is found that at no material time would the adopted parents have been lawfully removed from the City and County Borough of Leicester ; and it is contended that by virtue of the Adoption of Children Act, 1926, the boy was in the same position for this purpose as though he were a son born in wedlock living with his lawful father and mother. He had been, therefore, irremovable from Leicester for more than three years, and by s. 86 acquired a settlement in Leicester. The precursor of s. 93, sub-s. 4, is to be found in the Poor Removal Act of 1846. (1) It is well known that it was passed to remedy one of the scandals of the old Poor Law, the breaking up of families by distributing parents and children to different settlements. The effect of the decision under appeal is to disregard the formation of the strong family ties created by adoption and to revive for an adopted family the former scandals that attached to breaking up a natural family. The only Lord Justice who thought it necessary to refer to this consequence of the decision referred to it as "inconvenient." He might have permitted himself the stronger term formerly applied in this House, "tragic." I am glad to think that your Lordships are in agreement that the Adoption of Children Act, 1926, avoids the serious consequence to which I have referred. Sect. 5 of that Act prescribes the effect of an adoption order : "(1.) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint

a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock." It is to be observed that the Act does not put the adopter and the child into the position of natural parent and child for all purposes. But, as to the matters enumerated in sub-s. 1, custody, maintenance and education, it does in the plainest language transfer from the natural parent to the adopter the whole of the rights and obligations that flow from parenthood; and places the child in the same position as though he were the lawful natural child of the adopter.

The Court of Appeal appears to have been of opinion that notwithstanding this language one is not to construe a statute passed after 1926 and specifically creating rights or obligations in parents or children as though it related to adopters and adopted children unless they are specifically mentioned. My Lords, I venture to think with all respect that this is to misread that statute. The sub-section appears to me to have been carefully and skilfully drawn with the very object of avoiding reference to particular statutes. As Mr. Wightwick pointed out in his effective four-minute argument, the rights and obligations of parent and child as to custody, maintenance and education are at the present time almost entirely created or controlled by statute. Nearly seventy years ago, for instance, Sir Alexander Cockburn L.C.J. pointed out, in *Bazeley v. Forder* (1), that the duty of a parent to maintain his child is now derived from the Poor Law. It will now be found in s. 14 of the Poor Law Act, 1930. It is unnecessary to refer to the many statutes dealing with custody of children and education. In construing any statute, therefore, in order to ascertain whether

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H. L. (E.) it affects adopter or adopted children it is only necessary to consider whether the statute purports to deal with the rights or obligations of parents or the position of a child in relation to the matters of custody, maintenance, or education. If it does the adopter has the same rights and obligations as though he were the natural parent, and the child is in the same position as though he were the legitimate child of the adopters. I venture to think that this expresses the legal position better than to say that in such statutes parent must be read as meaning adopter : or that there are now two species of parents, natural and adoptive.

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My Lords, if this construction of the Adoption of Children Act, 1926, is correct the decision in this case turns on the question whether s. 93, sub-s. 4, of the Poor Law Act, 1930, is a section concerning the rights and obligations of the parent or of the child as to custody, maintenance or education. I cannot entertain any doubt that it is. It must be noted that the rights and obligations referred to are not merely rights and obligations as between father and child. They include all public duties and rights ; and quite clearly are subject to the sanctions of both civil and criminal law. The section gives a right to the father and mother named to retain the custody of the child under sixteen, and not to have him or her removed from them. The child has an equal right not to be removed from its parents. It follows that the adoptive parents have the same right ; so has the adopted child. In other words, the adopted child under sixteen is irremovable ; and as the conditions of s. 86 were complied with the child in this case acquired a settlement of his own in Leicester ; just as the illegitimate child in *Guardians of Fulham Parish v. Guardians of Woolwich Union* (1), and the child living with its deserted mother in *Guardians of Hackney Union v. Kingston-upon-Hull Incorporation for the Poor* (2), acquired settlements of their own while under sixteen. (3)

The Master of the Rolls found support for his decision in

(1) [1907] A. C. 255.

(2) [1912] A. C. 475.

(3) It was claimed that the

child in the present case acquired alternatively a derivative settlement under s. 85, sub-s. 1 (a).

the express reference in s. 5, sub-s. 5, of the Adoption of Children Act, 1926, to enactments relating to insurance against the payment of funeral expenses. He has, I think, omitted to notice that funeral expenses do not relate to custody, maintenance or education; and that therefore some express provision was needed if the subject had to be dealt with. He also refers to s. 52, sub-s. 7, of the Poor Law Act, 1930, which makes an express reference to the Adoption of Children Act, as suggesting an inference that when the Poor Law Act omits a reference elsewhere to the Adoption Act the omission is deliberate and excludes the Act. The reference in s. 52 of the Act of 1930 seems readily explicable by the fact that the section, which is being introduced into the consolidating Act, already referred to an "adoption" under Boards of Guardians, and it was necessary to distinguish between the old informal "adoption" and the new and regular one. I myself find it difficult to appreciate how the reasons adopted by the Court of Appeal in construing s. 93, sub-s. 4, of the Act of 1930 can co-exist with the open mind which they are prepared to keep on the question whether the duty of maintenance and the duty to reimburse the Poor Law authorities is transferred to the adopted parents. The duty is imposed by s. 14 and s. 19 upon the father. I cannot conceive how this is not a duty of maintenance referred to in s. 5, sub-s. 1, of the Adoption Act. But the sections contain no reference to the Adoption Act, and on the reasoning of the Court of Appeal it would appear that the obligation must still rest on the natural father. Your Lordships have not to consider the questions arising as to derivative settlement from the father or mother. It would seem to be the logical result of the Adoption Act that a child on adoption should take and follow the settlement of the adoptive parents, for it can hardly be denied that the principle of derivative settlement must be closely associated with the rights and duties of the parent as to custody and maintenance. Whether the words of s. 5 are sufficient, however, to establish this result is a matter which does not fall to be determined in the present case.

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My Lords, for the reasons given I am of opinion that the appeal should be allowed and the order of the Divisional Court restored. But it is impossible to leave the case without a reference to the case of *Ward v. Dorman, Long & Co.* (1), the decision which the Court of Appeal followed in the present case, repeating and adopting the same reasoning.

My Lords, the reasons given for that decision appear to be faulty on the grounds I have already stated. The learned Lords Justices look for a specific reference to the Adoption Act and find it wanting. They should have addressed themselves to the question whether the provisions of the Workmen's Compensation Act relating to dependants concerned rights and obligations as to custody, maintenance and education. Applying that test, it would appear to be clear that the adopted child in that case was in law, as he clearly was in fact, a dependant of the deceased workman. He had the same rights of maintenance as a child born in lawful wedlock; and had those rights exclusively against the adoptive father, the workman. He became therefore in the same position to the workman as a son or a daughter, was in fact and in law a member of the workman's family, and having occupied that position at the workman's death was entitled to the rights given to such members who are dependants. I think the case of *Ward v. Dorman, Long & Co.* (1) was wrongly decided and should be overruled. I suggest to your Lordships that the order appealed from be reversed and the order of the Divisional Court be restored, and that the respondents do pay the costs of the appeal here and below.

My Lords, I am desired to state that my noble and learned friends Lord Blanesburgh and Lord Thankerton agree with this opinion.

LORD WARRINGTON OF CLYFFE. My Lords, I also agree.

LORD WRIGHT. My Lords, I also agree.

Order appealed from reversed ; order of the King's Bench Division, thereby set aside, restored ; respondents to pay to the appellants their costs in the Court of Appeal and also their costs of the appeal to this House : Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

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Lords' Journals, July 19, 1934.

Solicitors for appellants : *Sharpe, Pritchard & Co., for Vernon Younger, Coventry.*
Solicitors for respondents : *Field, Roscoe & Co., for H. A. Pritchard, Leicester.*

Distinguished. *Re*
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[HOUSE OF LORDS.]

ELLIOT APPELLANT ; H. L. (E.)*
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LORD JOICEY AND OTHERS RESPONDENTS. 1935
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Will—Construction—Child en ventre sa mère—Power of appointment—Issue born in lifetime of appointor—Appointment to Child who should attain twenty-one years—Direction to retain share—Trust for Child “leaving issue him or her surviving”—Scots Law.

A testatrix executed a power of appointing trust funds under her father's will by appointing the funds in favour of all her children surviving her in equal shares, and directed that each child's share should be retained by the trustees of her father's will upon trust during twenty-one years from her death to pay the income of such share to such child if he or she should so long live. If such child should die within the said period of twenty-one years then the trustees were to hold such share and the income thereof in trust, in default of appointment by the

* Present : LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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child, upon the trusts following: "In the event of such child of mine leaving any issue him or her surviving in trust for such child of mine absolutely but in the event of such child of mine not leaving any issue him or her surviving then such share and the income thereof shall go and accrue by way of addition to the share or shares in the appointed funds of my other child or children who shall survive me," etc.

The testatrix died on January 12, 1912, leaving her surviving three sons, of whom one married on April 14, 1931, and died on May 11, 1932, intestate without having exercised the power of appointment under the will of the testatrix. On June 12, 1932, a posthumous child was born to him:—

Held, that the said son did not "leave issue him surviving" within the meaning of the will, but that, in the events which happened, his share accrued by way of addition to one of the other sons of the testatrix.

Villar v. Gilbey [1907] A. C. 139 followed; *Trower v. Butts* (1823) 1 S. & St. 181 and *Blasson v. Blasson* (1864) 2 D. J. & S. 665 approved: *In re Burrows* [1895] 2 Ch. 497 and *In re Griffiths' Settlement* [1911] 1 Ch. 246 disapproved; *Burns' Trustees v. Burns* 1917 S. C. 117 doubted.

The effect of *Villar v. Gilbey*, *supra*, may be thus summarized:—

Subject to any special context in the document to be construed:

1. Words referring to children or issue "born" before or "living" at, or "surviving," a particular point of time or event will not in their ordinary or natural meaning include a child *en ventre sa mère* at the relevant date.

2. The ordinary or natural meaning of the words may be departed from, and a fictional construction applied to them so as to include therein a child *en ventre sa mère* at the relevant date and subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date.

3. The only reason and the only justification for applying such a fictional construction is that where a person makes a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child *en ventre sa mère* must necessarily be within the reason and motive of the gift.

4. That being the only reason and the only justification for applying the fictional construction, it follows that, if the person who uses the words under consideration confers no gift on the children or issue described as above mentioned, but confers the gift on some one else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child *en ventre sa mère* a benefit to which if born it would be entitled, or that the child *en ventre sa mère* must necessarily be within the reason and motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning.

APPEAL from an order of the Court of Appeal (1) affirming an order of Clauson J. (2) H. L. (E.)

Mrs. Rose Elliot, hereinafter called the testatrix, was entitled under the will of her father, John Joicey, to a life interest in a legacy of 50,000*l.* and also in a share of the residue of her father's estate with a power of appointment by will among her issue born in her lifetime. The testatrix, who was a domiciled Scotswoman, made her will dated March 1, 1910, whereby she exercised her power of appointment under her father's will by appointing the funds in favour of all her children surviving her in equal shares who being male should attain the age of twenty-one years or being female should attain that age or marry, and, after certain provisions which need not here be stated, she directed by clause 5 of her will that each child's share should be retained by the trustees of the will of John Joicey upon the trusts following:—

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“(a) During the period of twenty-one years from the date of my death the said trustees shall pay the income of such share to such child if he or she shall so long live and in case of a female for her separate use without power of anticipation, during coverture.

“(b) If such child shall die within the said period of twenty-one years then the said trustees shall hold such share and the income thereof in trust for such person or persons for such purposes and in such manner in all respects as such child shall by will or codicil appoint and in default of and subject to any such appointment upon the trusts following (namely), In the event of such child of mine leaving any issue him or her surviving In trust for such child of mine absolutely but in the event of such child of mine not leaving any issue him or her surviving then such share and the income thereof shall go and accrue by way of addition to the share or shares in the appointed funds of my other child or children who shall survive me and being male shall attain the age of twenty-one years or being female shall attain that age or marry under it and if more than one in equal shares but subject,” etc., as therein mentioned.

(1) [1934] Ch. 140.

(2) [1933] Ch. 778.

H. L. (E.) The testatrix died on January 12, 1912, leaving five children
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 v. (the appellant), James Kerr Elliot (one of the respondents)
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She had added to her will a codicil the effect of which was that the daughters were not interested in the matter in dispute in this appeal.

Thomas William Henry Elliot married on April 14, 1931, and died on May 11, 1932, intestate without having exercised the power of appointment under the will of the testatrix. On June 12, 1932, a posthumous son was born to him.

The question was whether according to the true construction of clause 5 (b) of the will of the testatrix her son Thomas William Henry Elliot died without “leaving any issue him surviving.”

An originating summons was taken out by the Right Honourable James Baron Joicey, the Honourable John Pakenham Joicey-Cecil and Ernest Claude Meysey Thompson, the trustees of the will of John Joicey, against Robert Barnewall Elliot, James Kerr Elliot and James Greenshields Greenshields Leadbetter, that it might be determined whether the share of the legacy of 50,000*l.* and of the residuary personal estate of the said John Joicey, to the income of which Thomas William Henry Elliot was entitled during the period of twenty-one years from the death of Rose Elliot, belonged to the said James Greenshields Greenshields Leadbetter, the judicial factor (or legal personal representative) of Thomas William Henry Elliot, or whether the said share accrued by way of addition to the shares of Robert Barnewall Elliot and James Kerr Elliot (the other defendants to the summons) in the legacy and residuary estate.

The originating summons was heard before Clauson J., who made a declaration that the share in question passed to the legal personal representative of Thomas William Henry Elliot. (1)

Robert Barnewall Elliot appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Lawrence and

(1) See [1933] Ch. 778.

Romer L.J.J.) affirmed the decision of Clauson J. and dismissed the appeal. (1) H. L. (E.)

Robert Barnewall Elliot appealed to this House.

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1934. Dec. 7. *Wilfrid Greene K.C.* and *J. W. J. Cremlyn* for the appellant.

H. B. Vaisey K.C. and *Norman C. Armitage* for the respondent Leadbetter.

(The other respondents took no part in the argument.)

In the course of the argument Lord Macmillan observed that the will of the testatrix was a Scottish will and that the law to be applied in interpreting it was Scots law and not, as theretofore assumed, English law. In the result, however, the difference, if any, between the two systems of law became immaterial.

Dec. 13. The House took time for consideration.

1935. Feb. 14. LORD TOMLIN. My Lords, I have had the advantage of considering the opinion which has been prepared and is about to be read by my noble and learned friend, Lord Russell of Killowen. In the conclusion of that opinion and in the reasoning on which it is based I concur in all respects. It is therefore unnecessary for me to do more than state shortly the main reasons why I think as I do that the Courts below have erred.

I may note here that the attention of the Courts below was not directed to the fact that Mrs. Elliot was domiciled in Scotland and that her will falls to be construed by Scots law.

This oversight, however, raises no difficulty. Your Lordships' House, as the ultimate appellate tribunal both of England and of Scotland, does not require proof of the law of either country, whether the case under consideration be an English case in which a question of Scots law arises, or a case from Scotland in which a question of English law arises: see *Cooper v. Cooper*. (2)

The first question raised by the will under consideration is

(1) See [1934] 1 Ch. 140. (2) (1888) 13 App. Cas. 88, 101.

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I cannot think that upon the true construction of these words a posthumous child of a child of the testatrix is issue left by the parent him surviving. The expression "leaving any issue him or her surviving" is not in its ordinary and natural meaning appropriate to include a posthumous child, and there is nothing in my opinion in the context to justify extending the meaning.

On the one hand it is no answer to say that the testatrix intended to cover every contingency, because upon either construction every contingency is covered. Nor is it permissible to adapt the meaning to give effect to what it may be thought would have been the wish of the testatrix if her attention had been called to the possibility of that happening which in fact happened.

On the other hand, the period of distribution is the date of the death of the parent of the posthumous child. The parent or the brothers of the parent are according to the event the donee or donees under the appointment. The posthumous child is not a donee nor even an object of the power. There is nothing in the language of the will to suggest or justify the holding up of the distribution to meet the contingency of the birth of a posthumous child who when born will not be and cannot be a donee under the appointment.

It remains therefore to consider whether there can be applied to this case the doctrine based upon the maxim "foetus in utero habetur pro jam nato ubi agitur de ejus commodo."

So far as the English law is concerned the doctrine in question was explained in your Lordships' House in *Villar v. Gilbey*. (1) If the decision in *Burns's Trustees v. Burns* (2) is to be accepted as good law the doctrine is not recognized in Scotland. Having regard to the view which I take as to the limits of the doctrine it is not necessary for the purposes of

(1) [1907] A. C. 139.

(2) 1917 S. C. 117.

this case expressly to deal with the decision in *Burns's Trustees v. Burns* (1), but I desire to say that as present advised it seems to me to be in conflict with the statements of writers of authority (e.g., see Lord McLaren's work on Wills and Succession, 3rd ed. (1894), vol. i., 696), and to be unsupported by any earlier decision.

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But assuming that the doctrine has effect in Scotland and that in regard to it English law and Scots law are the same, I am of opinion that the doctrine cannot be applied in the present case. It is admitted that there is no example in the books of the doctrine, which is really an artificial rule of construction, being applied to the word "surviving" or to the phrase "leaving surviving"; but assuming that in appropriate circumstances it is applicable, as I think it is, to this word or phrase, the question is are the circumstances appropriate here, or in other words is it, within the meaning of the rule, for the child's benefit to apply the rule? The child does not take and could not take any benefit directly under the gift. The Courts below have taken the view that it must be for the child's benefit, as a general proposition, that its parent's estate should be increased. The application of this artificial rule of construction cannot of course depend upon the way in which the parent in fact disposes of his estate, or upon his domicile at his death, or upon the accident of the law applicable to his estate at his death.

I do not think the enrichment of the parent's estate is a benefit to the child within the meaning of the rule. In my opinion the rule contemplates a benefit taken by the child under the instrument as a result of the application of the rule. To give to the rule any other operation would be to make it a rule of great uncertainty and difficult of application.

The Courts below have based themselves upon a decision of Chitty J. in *In re Burrows* (2) and a decision of Joyce J. in *In re Griffiths' Settlement*. (3)

The former decision, given before *Villar v. Gilbey* (4) came to your Lordships' House, in my opinion was wrong and

(1) 1917 S. C. 117.
(2) [1895] 2 Ch. 497.

(3) [1911] 1 Ch. 246.
(4) [1907] A. C. 139.

H. L. (E.) cannot stand with *Villar v. Gilbey* (1), while the decision of Joyce J. was one construing a section of the Wills Act and therefore not strictly in *pari materia*, though it must not be understood that as at present advised I accept it as correct.

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My Lords, the result is that in my opinion this appeal should succeed. For the reasons about to be indicated by my noble and learned friend Lord Russell of Killowen, the order to be made by your Lordships' House should be in the form which he has prepared, and I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN. My Lords, under the will of her father (who died in the year 1881) Mrs. Elliot had a special power of appointment over certain funds exercisable in favour of her issue born in her lifetime. The funds in question represented a legacy of 50,000*l.* and a share of residue which had been bequeathed by her father's will and in which she took a life interest.

She made her will on March 1, 1910, being then the wife of Thomas Robert Barnewall Elliot, of Harwood, Hawick, in the county of Roxburgh, and thereby appointed the funds which were subject to her power by providing that the trustees of her father's will should hold them in trust for her children who should survive her and, being male, should attain the age of twenty-one years or, being female, should attain that age or marry under it, and if more than one in equal shares. After certain provisions cutting down shares of daughters and younger sons, which need not be referred to in greater detail, she proceeded to settle the shares of her children in manner following: she directed that during the period of twenty-one years from her death the said trustees should pay the income of each child's share to such child if he or she should so long live, and if such child should die within the said period of twenty-one years then (I quote the words of the will): "the said trustees shall hold such share and the income thereof in trust for such person or persons for such purposes and in such manner in all respects as such

child shall by will or codicil appoint and in default of and subject to any such appointment upon the trusts following (namely) in the event of such child of mine leaving any issue him or her surviving in trust for such child of mine absolutely but in the event of such child of mine not leaving any issue him or her surviving then such share and the income thereof shall go and accrue by way of addition to the share or shares in the appointed funds of my other child or children who shall survive me" as therein mentioned. If the child in question survived the said period of twenty-one years the said trustees were to hold the share or shares (whether original or accrued) of such child in the appointed fund and the income thereof in trust for such child absolutely.

Mrs. Elliot died on January 12, 1912, and her will (with a codicil thereto) was registered in the Books of Council and Session in Scotland on January 23, 1912. Confirmation of the executor therein named was granted by the Sheriff Court of the County of Roxburgh on April 13, 1912, and was resealed in England on April 30, 1912.

Mrs. Elliot had five children who survived her—namely, three sons and two daughters, but the daughters, by reason of the codicil, are not interested in the question now under debate. Of the three sons one, Thomas, died intestate and domiciled in Scotland on May 11, 1932, that is to say within the period of twenty-one years from his mother's death. He had married on April 14, 1931, but no child of the marriage was born during his lifetime. On June 12, 1932, his widow gave birth to a son who is still alive. In consequence of the death of Thomas during the period of twenty-one years the trusts quoted above came into operation, and the question which has arisen is who in the events which have happened became entitled under those trusts to the funds in question.

If the birth of the posthumous child fulfils the event described in the will as the event of Thomas "leaving any issue him surviving," then the absolute trust in favour of Thomas takes effect and the fund forms part of his estate. If, on the other hand, the birth of such a child does not fulfil the event, the fund must go over; because the failure of the event upon

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Before proceeding to consider the true construction of the clause in question I would call attention to the fact that the will of Mrs. Elliot is a Scottish will, the construction of which falls to be determined according to Scots law. This seems to have been overlooked in the Courts below; at all events the matter appears to have been there argued and treated throughout as one to be decided according to English law.

My Lords, I think, nevertheless, that it may be convenient to see how the matter stands under English law before considering how far, if at all, the position is altered under Scots law.

There are many cases decided by the Courts in England in which posthumous children have been held to be included in gifts to children born in a father's lifetime, or to children living at a father's death. The foundation of these decisions, however, as has now been clearly and definitely settled, is not that the natural or ordinary meaning of the words used is such that they include a posthumous child, but that an artificial meaning must be placed upon the words because "the potential existence of such a child places it plainly within the reason and motive of the gift." These words are the words used by Leach V.-C. in *Trower v. Butts* (1) and subsequently approved with a defined limitation by Lord Westbury in *Blasson v. Blasson*. (2) Both these authorities have, as will appear, been accepted as correct in your Lordships' House.

There is not, so it happens, any authority precisely covering the event postulated by Mrs. Elliot—namely, the death of a parent "leaving any issue him or her surviving." The word "surviving," however, which, in my view, according to its ordinary meaning requires that the person who is to survive shall be living both at and after a particular point of time, ought, as it seems to me, to be governed by the same considerations as those which have been applied to the word

(1) 1 S. & St. 181, 184.

(2) 2 D. J. & S. 665.

"living," where the event postulated has been that there should be a child living at a particular point of time, e.g., at its father's death.

To refer to all the relevant authorities, which are numerous, would be a useless task. The earlier years show decisions not altogether uniform. It will, I think, suffice if I mention only a few earlier in date to *Trower v. Butts* (1) and *Blasson v. Blasson*. (2)

Millar v. Turner (3) was the case of a provision in a marriage settlement in favour of such child or children of the marriage as should be living at the death of the father. It was decided that a child born after the death of the father shared with the rest. Lord Hardwicke stated in regard to a posthumous child (4): "in all cases relating to his advantage he must be considered as in esse according to the rule of the civil law; so on the Statute of Distribution he shall be considered as living; the intention being to provide for all the children; and if that be so, the same reasoning will hold in a marriage settlement, where the intention was to provide for all the children of the marriage."

In *Doe v. Clarke* (5) it was stated that it seemed then settled that an infant en ventre sa mère should be considered, generally speaking, as born for all purposes for his own benefit. That was a case in which a devise was made to a man for his life and after his death to all and every such his child or children as should be living at the time of his decease (other than an excepted named child) as tenants in common and the heirs and assigns of such child for ever.

In *Thellusson v. Woodford* (6) the matter was debated in your Lordships' House in connection with the question of perpetuity. Peter Thellusson had by his will directed accumulation to take place during the lives of the survivors and survivor of his three living sons, his one living grandson and (putting it shortly) his (the testator's) other issue who might be living at his decease or born in due time afterwards.

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(1) 1 S. & St. 181, 184.

(2) 2 D. J. & S. 665.

(3) (1748) 1 Ves. Sen. 85.

(4) Ibid. 86.

(5) (1795) 2 H. Bl. 399, 401.

(6) (1805) 11 Ves. 112.

H. L. (E.) It was contended amongst other things that this period of accumulation exceeded the limits allowed by law, since the persons born in due time after the testator's decease could not be considered as persons actually born in his lifetime. The opinion of the judges was sought. Their unanimous opinion was delivered by the Lord Chief Baron Macdonald, who reviewed the authorities and concluded the relevant portion of that opinion thus (1) :—

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“ It seems then, that if estates for life had been given to the several cestuis que vie in this will, and after their deaths to their children, either born or en ventre sa mère at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time, during which the vesting of the property, which is the subject of this devise, shall be protracted ; inasmuch as the circulation of real property is no more fettered in one case than in the other.” It will be observed that this case had nothing to do with any question of construction analogous to the question now in issue ; it related solely to the question of the period of gestation in relation to perpetuity. Lord Eldon, however, in moving that the decree appealed from be affirmed, used certain language which has been quoted in other cases relating to construction, including the case in debate before us to-day. He spoke thus (2) : “ But, if it is necessary, I have no difficulty in stating, as a lawyer, that the rule of law has been properly laid down, that the time of gestation may be taken both at the beginning and the end ; and that is what was meant in *Gulliver v. Wickett* (3), in which case the devise was to a child en ventre sa mère ; and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation, expressly to a child en ventre sa mère, suppose, that child had at the age of twenty married, and died six months afterwards, leaving his wife ensient ; that property, absolutely given to him, would not

(1) 11 Ves. 141.

(2) Ibid. 149.

(3) (1745) 1 Wils. 105.

be devested, merely because the child was not born till three months after his death. In fair reasoning therefore that is the construction of the words.”

Trower v. Butts (1) is a case of great importance in view of the references to it in subsequent cases. The will of May Smith bequeathed a sum to trustees to invest and pay the dividends to Maria Heathcote for life and after her death to hold the corpus in trust for all the children of Robert Trower “born” in the lifetime of the testatrix. She died in October, 1821, at which time the wife of Robert Trower was enceinte. There were children of Robert Trower already in existence when the testatrix died. In February, 1822, a son was born to Robert Trower. Leach V.-C. held that that son was entitled to a share of the legacy: but the grounds of his decision need to be noted. He states the law as “fully settled” in regard to gifts to children living at the death of a testator—namely, that a child en ventre sa mère is within such a gift not because such a child answers the description of a child living, “but because the potential existence of such a child places it plainly within the reason and motive of the gift.” He then points out that the Courts in other cases have acted as on the footing that there was no difference between the expressions “born in the lifetime” and “living at the death,” and holds that the rule of construction which places a child en ventre sa mère within the intention of a gift to children living at the death of a testator, because plainly within the reason and motive of the gift, should equally apply and for the same reason so as to bring such a child within the intention of a gift to children born in the lifetime of a testator. In other words the Vice-Chancellor held that, departing from the ordinary meaning of the words, a gift to children “born in the lifetime” of a testator and a gift to children “living at the death” of a testator stood upon the same footing in this regard, that a child en ventre sa mère at the testator’s death is within the gift, but only for the reason that such a child is plainly within the reason and motive of a gift to children described as above.

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Lord Westbury considered the case of *Trower v. Butts* (1), when the case of *Blasson v. Blasson* (2) came before him on appeal from Kindersley V.-C. A testatrix had bequeathed moneys to be invested and accumulated during a period, the termination of which was the attainment of twenty-one years by the youngest of the children of three named nephew and nieces "who shall have been born and living at the time of my decease," when she directed the fund to be equally divided among all such children of the three nephew and nieces "as shall then be living, share and share alike." She died on January 8, 1844. The nephew and nieces all had children then actually born, and the youngest of those attained twenty-one on August 20, 1863. One niece had a child born on June 11, 1844, and another subsequently. The other niece had a child born on August 2, 1844, and six others subsequently. Kindersley V.-C. had held (1.) That the period of division was August 2, 1865, when the youngest child en ventre sa mère attained twenty-one, and (2.) that all children whether born before or after the death of the testatrix who were living at the period of distribution were entitled. Lord Westbury affirmed the Vice-Chancellor on the second point, but held that the trust for accumulation ceased when the youngest of the children actually born and living at the death of the testatrix attained majority. He specifically approved of the decision in *Trower v. Butts* (1) as right and well warranted by previous decisions; but he points out (3) that "the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to, and that it is limited to cases where 'de commodis ipsius partus quaeritur.'" He describes the means by which an unborn child is included among children born or living as a "fictitious legal interpretation," and a "peculiar rule of construction," and limits the application thereof to cases where such construction is necessary for the benefit of the unborn child. In the case before him there was no such

(1) 1 S. & St. 181.

(2) 2 D. J. & S. 665.

(3) Ibid. 670.

necessity, for the actual gift clearly included all children living at the period of distribution whether born or unborn at the death of the testatrix.

In *Pearce v. Carrington* (1) a testator by his will gave an annuity to his wife during widowhood with directions to set aside a fund the income of which would be sufficient to answer the annuity, and after her decease or second marriage he directed his trustees to stand possessed of the annuity fund on trust, in case his daughter should have any child or children who being sons or a son should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, to pay and divide the same unto and between such child or children, and if there should be no such child or children upon trust for certain named persons. By a codicil he directed that in the event of his daughter not having any such child or children as mentioned in his will, only 40,000*l.* of the annuity fund should be divided among the named persons, the balance to form part of his residuary estate; provided that if his daughter should be living at the expiration of five years from the death of his wife and should not then have had any child or children, he directed that the said sum of 40,000*l.* should be at once paid and divided among the named persons as if his daughter were dead without children after the decease of his wife. The testator died in 1865; his widow died on November 9, 1867; the first child of the testator's daughter was born on May 4, 1873. She was presumably enceinte when the five years period expired on November 9, 1872. Wickens V.-C. held that the gift over of the 40,000*l.* had not taken effect, and his decision was affirmed by James and Mellish L.JJ. This is an instance of the "fictitious legal interpretation" being applied for the purpose of preventing the divesting of a gift by the testator to a class of which the unborn child when born would be a member. For this purpose the child en ventre sa mère, who when born would be one of the children entitled to share in the annuity fund contingently on attaining the age of twenty-one, was treated as actually born within the period of five

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Villar v. Gilbey (1) is the most recent decision in your Lordships' House and requires close attention. A testator devised certain real estate in favour of his brother and his brother's sons and daughters, and died on September 18, 1854. At that date the brother had two sons—namely, Alfred (the elder) and George. After giving his brother a life estate therein, the testator devised the real estate to Alfred for life, with remainder to Alfred's sons successively in tail, with remainders over to Alfred's daughters in tail ; and in default of such issue to George for life, with similar remainders to George's sons and daughters in tail ; and in default of issue of George to the third, fourth and every other son or sons of the testator's brother severally successively and in remainder one after the other in tail ; but he declared his intention to be " that any third or other son of my said brother born in my lifetime shall not take a larger interest in my estate than for life only, with remainder to his issue in tail male and then in tail female." Alfred died in 1879 without ever having had any issue. George died in 1903 without ever having had any issue. A third son, William, had been born to the testator's brother some three weeks after the testator's death—namely, on October 9, 1854 ; and the question arose whether his estate, which had become an estate in possession, was cut down to an estate for life, upon the footing that he was a son of the testator's brother born in the testator's lifetime. It was held by Swinfen Eady J. (2) that the words of the will must receive their natural construction, and that considerations of the kind which enabled a child en ventre sa mère to come within such words as " living " or " born " at a certain time for the purpose of taking under or fulfilling the conditions of a gift, had no application to a case where the only result of applying them would be to cut down the child's interest. He accordingly declared that William's estate was an estate tail. This decision was reversed in the Court of Appeal. (3)

(1) [1907] A. C. 139.

(2) [1905] 2 Ch. 301.

(3) [1906] 1 Ch. 583.

Romer L.J. stated (1) that a long series of cases had established that for many purposes connected with wills and their construction a child en ventre sa mère at a particular time who is subsequently born alive is to be considered as "living" or "born" at that time; and that the rule was not limited to cases where the gift was for the benefit of the child itself. As authorities for this last proposition he cited the cases of *Pearce v. Carrington* (2) and *In re Burrows*. (3) He states the general principle thus (4): "In particular, I think, with regard to wills, that they ought to be construed and given effect to without making any such distinction" (i.e., a distinction between a child actually born at a particular time and a child at that time en ventre sa mère and subsequently born alive) "unless the context requires a distinction to be made." He further states that *Blasson v. Blasson* (5) ought not to be followed, because Lord Westbury limits the indulgence of the law to cases where its application enables the unborn child to take a benefit to which, if born, it would be entitled. "'The indulgence of the law,'" says Romer L.J. (6), "is not so limited." Cozens-Hardy L.J. took the same view. (7) "I think it is now settled by authority . . . that this limitation can no longer be maintained"; and he states the rule thus (8): "I think that 'as a general rule of construction' the word 'child' living at or born at a particular date includes a posthumous child, in the absence of any context indicating a contrary intention, and I desire to base my judgment in favour of the appellant on that broad principle." He also considered *Blasson v. Blasson* (5) to be bad law.

My Lords, *Villar v. Gilbey* (9) when it left the Court of Appeal contained a clearly defined rule of construction applicable to wills which could, I think, easily have been applied to the present will, notwithstanding the different phraseology there employed. The posthumous child would

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(1) [1906] 1 Ch. 590.

(5) 2 D. J. & S. 665.

(2) L. R. 8 Ch. 969.

(6) [1906] 1 Ch. 593.

(3) [1895] 2 Ch. 497.

(7) Ibid. 594.

(4) [1906] 1 Ch. 592.

(8) Ibid. 595.

(9) [1907] A. C. 139.

H. L. (E.) be included in the words "issue him surviving," which only mean children or remoter issue living at and after a particular date, and accordingly the event postulated by the will would have happened; Thomas could then well be said to have left issue him surviving. Your Lordships' House, however, declined, and, as I think, emphatically declined to accept this view of the law. The Lord Chancellor said (1) that the case depended upon whether or not such a rule of construction as the Court of Appeal had described had been established by the authorities. He points out that the construction, which includes a child en ventre sa mère in the description of children "living at the father's death," is a straining of language, a fiction or indulgence on the ground that it is for the child's benefit, and that it is everywhere stated or assumed that no such construction will be applied unless it is for the benefit of the child. After citing *Trower v. Butts* (2) and *Blasson v. Blasson* (3), and quoting Lord Westbury's limitation of the rule, he read the rule laid down by Cozens-Hardy L.J. and proceeded thus (4): "It will be observed that this principle is laid down quite broadly and regardless of the circumstance whether the construction is for the benefit of the child or not. The Court of Appeal thought that this distinction had been overruled by authority. When I examine the cases . . . cited in support of this view, I cannot find that they support it. It seems to me that the sentence I have quoted from Lord Westbury L.C. accurately states the rule and its limitation, and, with the utmost respect to the Court of Appeal, I cannot accept the rule without the limitation, because there is not authority for such a view. I agree . . . that it may be difficult at times to say when a particular construction is for the benefit of a child. But I am not on that account to extend to all cases a construction which has throughout been applied only to a particular class. Authority may compel us to do violence to the English language, and to say that in some cases a child is born weeks or months before it is brought forth. But in my opinion

(1) [1907] A. C. 144.

(2) 1 S. & St. 181.

(3) 2 D. J. & S. 665.

(4) [1907] A. C. 146.

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we ought not to say so, knowing that it is not the fact, unless we are constrained by authority. And we are not so constrained, except where it is for the child's benefit." Lord Macnaghten agreed with the Lord Chancellor's judgment, so too did Lords James of Hereford and Robertson, the former adding that the judgment of Lord Westbury (i.e., in *Blasson v. Blasson* (1)) and the dicta which controlled that judgment ought to prevail in the case before the House. Lord Atkinson delivered a judgment in which he considered a large number of the earlier authorities, and in particular *Trower v. Butts* (2), *Blasson v. Blasson* (1), and *Pearce v. Carrington* (3), and held that the Court of Appeal was wrong in holding that the rule of construction was a general rule applicable irrespective of the question of securing a benefit to the child en ventre sa mère.

The result of the decision in *Villar v. Gilbey* (4) in your Lordships' House seems to me to be threefold: (1.) The authority of *Trower v. Butts* (2) and of *Blasson v. Blasson* (1) is established beyond attack. As Moulton L.J. said in the subsequent case of *In re Salaman* (5): "In my view the House of Lords in *Villar v. Gilbey* (4) authoritatively supported the decision of Lord Westbury in *Blasson v. Blasson* (1) and of Leach V.-C. in *Trower v. Butts*." (2) (2.) Such words as "living" at a particular time or "born" at or during a particular time or period do not according to their ordinary or natural meaning include a child who is en ventre sa mère at the particular time or during the particular period; and (3.) they can only include such a child by a fictional construction, which, however, must not be resorted to except in circumstances to which I refer in my summary of what I conceive to be the law as settled by *Villar v. Gilbey*. (4)

Clauson J. has decided this case primarily upon the ground that no legal fiction or indulgence is here necessary, because the words "issue surviving a parent A.B." are "not inapt" to cover the case of a child "in being" at the death of

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(1) 2 D. J. & S. 665.

(3) L. R. 8 Ch. 969.

(2) 1 S. & St. 181.

(4) [1907] A. C. 139.

(5) [1908] 1 Ch. 4, 7.

H. L. (E.) A.B. ; and he adopts what he calls this “ loose and secondary meaning,” in construing Mrs. Elliot’s will. This is to include the posthumous child on the ground that it was in fact living at the crucial date, the very thing which the judgments in *Trower v. Butts* (1), *Blasson v. Blasson* (2), and *Villar v. Gilbey* (3), as I read them, prevent us from doing. He fortifies himself in this procedure by a reference to a decision of Joyce J., *In re Griffiths’ Settlement* (4), in which reference is made to a case before Chitty J., *In re Burrows*. (5)

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It is necessary to examine both these authorities. *In re Burrows* (5) was a case in which a testator bequeathed his residue to his wife for life and on her death as to one moiety—“ to my daughter Kate Cleghorn for her absolute use and benefit in case she has issue living at the death of my wife, but in case she has no issue then living ” then to her for life, after her decease to her husband for life and after his decease to the children of the testator’s son. The testator died on November 26, 1894 ; his widow died on March 9, 1895 ; and on the following day Kate Cleghorn was delivered of a living child. Chitty J. held at the outset of his judgment that the child was “ living ” when the widow died, within the words of the will ; i.e., his decision was that the words “ issue living ” included a child en ventre sa mère simply because such a child was “ living.” He then continued (6) : “ Then it is said that the rule is that the child en ventre sa mère is not deemed to be living except where there is a benefit passing directly to the child ; and as the mother and not the child in this case takes the benefit, the gift over takes effect. But the question is covered by authority.” He then cites the authority—namely, the passage from Lord Eldon’s judgment in *Thellusson v. Woodford* (7), which I have already quoted, and which is merely a dictum uttered in a judgment concerned, not at all with construction, but with perpetuity only. Even viewed as a decision, it would be a decision that the rule of construction was not subject

(1) 1 S. & St. 181.

(2) 2 D. J. & S. 665.

(3) [1907] A. C. 139.

(4) [1911] 1 Ch. 246.

(5) [1895] 2 Ch. 497.

(6) Ibid. 498.

(7) 11 Ves. 112, 149.

to any limitation at all, not a decision that, there being the limitation, the rule would apply even if the benefit to the child were only of an indirect kind. *In re Burrows* (1) did not decide that a benefit to the mother was a benefit to the child within the meaning of the limitation. It only decided against the existence of any limitation which forbade the construction which the learned judge had adopted. The decision cannot in my opinion stand after *Villar v. Gilbey*. (2)

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In re Griffiths' Settlement (3) was a case under s. 33 of the Wills Act, the relevant words being "die in the lifetime of the testator leaving issue and any such issue shall be living at the time of the death of the testator." A testator made a will dated June 20, 1904, under which a son Arthur took a share. In April, 1908, Arthur married and he died on September 4, 1908. The testator died on November 9, 1908, and on April 29, 1909, Arthur's widow gave birth to a daughter. Two questions were raised, the first to be argued (and the only one relevant to our present purpose) was whether the posthumous daughter was issue left by Arthur living at the time of the testator's death within the meaning of s. 33. If the answer was in the affirmative, then there being no contrary intention expressed in the will the bequest to Arthur would not lapse but would form part of Arthur's estate. The argument on this question appears, from the report, to have taken a strange course. Mr. Rolt, on behalf of Arthur's executors, relied on *In re Burrows* (1); Mr. Harman, claiming intestacy as to the share, contended that the point depended on whether the infant took a benefit and cited *Villar v. Gilbey* (2); i.e., he argued that the section did not apply because since the child was given nothing by the section, there was no justification for the application of the fictional construction, under which the posthumous daughter could be included in the words "issue . . . living at the time of the death of the testator." He was stopped by the learned judge. The arguments on the second point were then heard, and at their conclusion the learned judge

(1) [1895] 2 Ch. 497.

(2) [1907] A. C. 139.

(3) [1911] 1 Ch. 246.

H. L. (E.) delivered judgment on both points without hearing any further argument from Mr. Harman. His judgment on the first is racy of the judicial soil from which it sprang. It was adverse to Mr. Harman's contention. After stating the facts and reading s. 33, he delivered judgment in these words: "The defendant Edith Mary Griffiths is issue of the testator's son Arthur, and she was living although not born at the testator's death, and I do not hesitate to decide that s. 33 applies to such a case. If this be a decision requiring the support of authority, it is to be found in *In re Burrows*. (1) It would be most unfortunate if the law were otherwise, the case being obviously within the mischief intended to be remedied by s. 33." As I read that judgment it decides (1.) that the daughter came within the words of the section not by reason of any rule of construction giving a peculiar meaning to the words of the section, but because she was in fact "living" at the particular date; and (2.) that *In re Burrows* (1) justified that view. It is essential to observe that the question of benefit to the infant (upon which counsel had been stopped), is not in any way dealt with by the learned judge. Whatever may be the true position in regard to s. 33, it seems clear to me that the grounds upon which this decision is based cannot be justified in the face of *Villar v. Gilbey*. (2) Clauson J. was no doubt to some extent justified in claiming *In re Griffiths' Settlement* (3) and *In re Burrows* (1) in support of his view that a child en ventre sa mère may properly and without legal fiction or indulgence be included in the words "issue surviving a parent A.B.," as being a child "in being" or "living" at the particular point of time; but he failed to appreciate the full effect of *Villar v. Gilbey* (2) upon those decisions.

In his judgment he next states that there is no authority for the proposition that such an expression as "child living" cannot be treated as including a child en ventre sa mère unless such a child takes a benefit under the clause. This appears to me a crucial statement and an erroneous one.

(1) [1895] 2 Ch. 497.

(2) [1907] A. C. 139.

(3) [1911] 1 Ch. 246.

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In my opinion *Villar v. Gilbey* (1) approving as it does of *Trower v. Butts* (2), and *Blasson v. Blasson* (3), is a binding decision on the point. *Trower v. Butts* (2), first, abolished the idea that as a matter of ordinary construction the words "born" or "living" could be applied to a child en ventre sa mère, and secondly, declared that it was fully settled, in regard to gifts to children "living" at the death of a testator, that a child en ventre sa mère is included solely because the potential existence of such a child placed it plainly within the reason and motive of the gift, and thirdly, applied the same exceptional construction to a gift to children "born" at the death of a testator. The only cases which (judging from his language) were present to the mind of the Vice-Chancellor as cases in which this exceptional construction was admissible, were cases of gifts to a class of children "living" or "born" at some specified point of time. This exceptional construction, described by Lord Westbury in *Blasson v. Blasson* (3) as a "fictional legal interpretation," is stated by him to be applied only for the purpose of enabling the unborn child to take a benefit to which if born it would be entitled. That can only mean entitled under the document to which the fictional legal interpretation is being applied. Finally, in *Villar v. Gilbey* (1), which established the authority of *Trower v. Butts* (2) and *Blasson v. Blasson* (3), your Lordships' House laid it down that the fictional construction ought not to be applied unless the Court was constrained by authority. Clauson J. has held that this construction can be applied, if its application secures a benefit to some other person, who in turn may or is likely to pass on some portion thereof to the unborn child when born. As I have pointed out there is no authority in favour of this view; nor is it in accordance with the principle approved of in this House. It is impossible to say with any accuracy or certainty that any child of A. born or unborn is within the reason and motive of an absolute bequest to A. The property vests in A. on the death of the testator. True it is that A. may make

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(2) 1 S. & St. 181.

(3) 2 D. J. & S. 665.

H. L. (E.) provision for any or all of his children thereout ; but on the other hand he may not. He may assign it away where he pleases in his lifetime, and bequeath it where he pleases by his will ; or his debts may swallow it up. No one can tell what will happen ; and it is in my opinion inadmissible to ascertain the meaning of words used in a document by construing them in the light of subsequent events. It is impossible in the present case to predicate, except by guesswork, that the children of Thomas were within the reason and motive of the appointment to Thomas.

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In the Court of Appeal the Master of the Rolls accepts the view that the rule which admits of the fictional construction is based upon the child being within the reason and motive of the gift. He then asserts that the children of Thomas are within the reason and motive of this gift. Finally, he holds that *In re Burrows* (1) decided that the fictional construction was applicable even if there was no gift to a child or children, but only some indirect benefit which might be derived from a gift made to its parent ; and that *Villar v. Gilbey* (2) in no way overruled that decision. In reliance on that decision he held that the appeal should fail.

Lawrence L.J. agreed, relying, as I read his judgment, entirely on *In re Burrows* (1) and *In re Griffiths' Settlement* (3), as cases which decided that the fictional construction would be applied in order to preserve a gift to the parent of the child. Romer L.J. also agreed. After expressing a doubt whether the law, as settled by *Villar v. Gilbey* (2) in relation to not treating a child en ventre sa mère as " born " at a particular time unless it is to the interest of the child that he should be so treated, applied also to the construction of the word " living "—a doubt which seems to me ill-founded—he affirmed the decision of Clauson J. on the ground that Chitty J. had decided in *In re Burrows* (1) that it was not necessary that the child should take a direct benefit under the instrument which was being considered.

(1) [1895] 2 Ch. 497.

(2) [1907] A. C. 139.

(3) [1911] 1 Ch. 246.

My Lords, I have already indicated my view that *In re Burrows* (1) (founded on Lord Eldon's dictum in *Thellusson v. Woodford* (2)) and *In re Griffiths' Settlement* (3) (founded on *In re Burrows* (1)) are not authorities upon the question of indirect benefit as contrasted with direct benefit, and moreover that they cannot stand after *Villar v. Gilbey*. (4) If I am right in this, the foundations of the judgments of the Court of Appeal disappear.

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The Master of the Rolls thought that the Lord Chancellor in *Villar v. Gilbey* (4), when he said that it might be difficult at times to say when a particular construction was for the benefit of a child, indicated a view that an indirect benefit, not conferred upon the child by the instrument under consideration, was sufficient to justify the fictional construction. I cannot read that meaning into his words, which merely seem to say that the instrument which is being construed may be so worded as to raise a doubt whether a particular construction will in fact benefit the posthumous child. I see nothing in the language used to indicate a view that the benefit may spring from a source other than the instrument itself.

The law as settled by *Villar v. Gilbey* (4) may (but subject to any special context in the document to be construed) be summed up thus: First, words referring to children or issue "born" before, or "living" at, or (as I think we must add) "surviving," a particular point of time or event, will not in their ordinary or natural meaning include a child en ventre sa mère at the relevant date. Secondly, the ordinary or natural meaning of the words may be departed from, and a fictional construction applied to them so as to include therein a child en ventre sa mère at the relevant date and subsequently born alive if, but only if, that fictional construction will secure to the child a benefit to which it would have been entitled if it had been actually born at the relevant date. Thirdly, the only reason and the only justification for applying such a fictional construction is that where a person makes

(1) [1895] 2 Ch. 497.

(2) 11 Ves. 112, 149.

(3) [1911] 1 Ch. 246.

(4) [1907] A. C. 139.

H. L. (E.) a gift to a class of children or issue described as "born" before or "living" at or "surviving" a particular point of time or event, a child en ventre sa mère must necessarily be within the reason and motive of the gift. Fourthly, that being the only reason and the only justification for applying the fictional construction, it follows that, if the person who uses the words under consideration confers no gift on the children or issue described as above mentioned, but confers the gift on some one else, it is impossible (except in the light of subsequent events) to affirm either that the fictional construction will secure to the child en ventre sa mère a benefit to which if born it would be entitled, or that the child en ventre sa mère must necessarily be within the reason and motive of the gift made. In these circumstances the words used must bear their ordinary or natural meaning.

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This seems to me to be the inevitable result of the adoption and approval by your Lordships' House of *Trower v. Butts* (1) and *Blasson v. Blasson* (2), of their acceptance of Lord Westbury's statement of the rule, and of its limitation—namely, "only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to" (3), and of their refusal to do violence to language unless constrained by authority so to do.

According to the law of England as it now stands this appeal must succeed.

In regard to Scots law, if the case of *Burns's Trustees v. Burns* (4) was rightly decided, it would seem that according to that law the fictional construction is inadmissible, and that the word "born" must receive its ordinary or natural meaning. I have, however, had the advantage of reading the opinion of my noble and learned friend Lord Macmillan in the present case, and, agreeing with it as I do, it will be sufficient if I point out that the Scots law being certainly not more favourable to the claims of a child en ventre sa mère than the English law, this appeal must equally succeed under Scots law.

(1) 1 S. & St. 181.

(2) 2 D. J. & S. 665.

(3) Ibid. 670.

(4) 1917 S. C. 117.

But for the fact next mentioned, the proper order to make would be an order directing that the order of the Court of Appeal be set aside, and the order of Clauson J. be varied by declaring that the funds therein described belong to the two brothers of Thomas Elliot (namely, the defendants Robert Barnewall Elliot and James Kerr Elliot) in equal shares. The only person however who has appealed from the orders of Clauson J. and the Court of Appeal is the defendant Robert Barnewall Elliot. James Kerr Elliot has never appealed at all; and as against him therefore the order of Clauson J. is binding. He can take no interest in the funds.

The proper course to adopt in these circumstances is to set aside the order of the Court of Appeal, and to vary the order of Clauson J. in manner following: (1.) by inserting therein immediately after the words "now belongs" the words "as to one moiety thereof" and by adding at the end of the declaration therein contained, the words "and as to the other moiety thereof to the defendant Robert Barnewall Elliot"; and (2.) by striking out the order therein contained as to costs and substituting in its place an order directing that the costs of all parties be taxed as between solicitor and client and paid out of the total funds before division into moieties. As regards the costs of the appeal to the Court of Appeal and to your Lordships' House I think that the costs of the plaintiffs and the defendants should be taxed as between solicitor and client and paid out of the total fund before division as aforesaid.

LORD MACMILLAN. My Lords, in the course of the argument for the appellant I drew attention to the circumstance, which had apparently escaped notice in the Courts below, that the will which your Lordships are invited to construe, though bearing traces in its language of an English draftsman's hand, is the will of a domiciled Scotswoman. This plainly appears from the facts that the testatrix designates herself as "the wife of Thomas Robert Barnewell Elliot, of Harwood, Hawick, in the County of Roxburgh," that confirmation was taken out in Scotland and that the will was registered in the

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H. L. (E.) Books of the Lords of Council and Session. The law applicable to the interpretation of the will is therefore the law of Scotland and not, as hitherto assumed, the law of England.

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Fortunately this circumstance need not embarrass your Lordships in disposing of the case. No doubt in the Courts below the law of Scotland is a matter of fact and must be vouched there by evidence or admission. But in your Lordships' House the law of Scotland is a matter not of fact but of law, for this House is the commune forum of both England and Scotland and your Lordships have judicial knowledge of the laws of both countries. As Lord Halsbury L.C. said in *Cooper v. Cooper* (1): "Your Lordships sitting here require no evidence, indeed can receive no evidence, of English or Scottish law." Nor is it material that in the present case the Courts below had neither evidence nor argument on Scots law. In *Cooper v. Cooper* (2), which was an appeal from the Court of Session in Scotland, this House decided the case on a point of Irish law on which the Court of Session had no evidence and which was not argued there. I again quote from the same paragraph of Lord Halsbury's speech: "if all the facts are before your Lordships for decision . . . then it is not only competent but incumbent upon this House to decide upon the true view of what legal rights these facts establish, although what was a question of fact in the Court of Session was not there mooted but is for the first time argued here before your Lordships."

I proceed therefore to consider as a question of Scots law the problem of interpretation which Mrs. Elliot's will presents in the circumstances which have arisen. The problem is whether her son, Thomas William Henry Elliot, who died on May 11, 1932, can be said to have died "leaving any issue him surviving," in view of the fact that, while he had no children at the date of his death, his widow gave birth to a son on June 12, 1932. As it happens, and as will appear in the sequel, there is no difference of doctrine between the law of England and the law of Scotland in the matter of the interpretation to be placed on the critical words I have

(1) 13 App. Cas. 88, 101.

(2) Ibid. 88.

quoted where a posthumous child is concerned, although of course the English cases referred to by Clauson J. and the Court of Appeal which did not reach this House are not of binding authority in Scotland.

The argument in favour of holding that the critical words were in the circumstances satisfied was presented in two ways. In the first place it was argued that, as a mere matter of construing the English language and apart from any special fiction of law applicable to posthumous children, it was accurate and according to ordinary parlance to describe a deceased person as having died leaving issue him surviving although his only issue was a posthumous child, and indeed that it would not be true to say of such a person that he died without leaving issue him surviving. A deceased person, it was said, must either leave or not leave issue him surviving, and if his only child be a posthumous one then the case falls within the former rather than the latter category; in such a case if any one were to ask whether the deceased died leaving issue him surviving, the ordinary and true answer would be in the affirmative, and only a pedantic precisian would answer that he died without leaving issue him surviving but that he subsequently had issue in the shape of a posthumous child.

My Lords, this argument is attractive but in my opinion it is unsound. The question whether Mr. Thomas William Henry Elliot left issue him surviving is a question which must be determined as at the date of his death. At the date of his death he had no issue. If common parlance is to be appealed to, the deceased's obituary notice would undoubtedly have stated that he died leaving no children. I do not think that it is justifiable to seek to alter what was the fact at his death by what subsequently happened. It may be accurate enough now to say that he died leaving issue him surviving, but it would not have been accurate to say so at the date of his death, and that is what matters. It may well be that if some one had said to the testatrix, "But what if your son has only a posthumous child?" she might have replied, "I mean to include that case;" and appropriate language might have

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been used to do so. But the question presumably was not asked and the case of a posthumous child was not covered. I am accordingly against giving to the language of the testatrix a meaning which according to the ordinary use of words it does not bear.

The respondents' second argument invokes the special benevolence which the law has always shown towards posthumous children. The judgments below are mainly based on this principle, but with all respect I think that it has been misapplied.

From the earliest times the posthumous child has caused a certain embarrassment to the logic of the law, which is naturally disposed to insist that at any given moment of time a child must either be born or not born, living or not living. This literal realism was felt to bear hardly on the interests of posthumous children and was surmounted in the Civil Law by the invention of the fiction that in all matters affecting its interests the unborn child in utero should be deemed to be already born. The classical statement is to be found in the words of Paulus: "*Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipsius partus quaeritur: quanquam alii, antequam nascatur, nequaquam prosit*" (Dig. Bk. I, Tit. V, De Statu Hominum, sect. 7), thus rendered in Monro's translation: "An unborn child is taken care of just as much as if it were in existence, in any case in which the child's own advantage comes in question; though no one else can derive any benefit through the child before its birth." "There is indeed," says Craig, commenting on this passage, "no reason in the case of a posthumous child to aggravate the calamity it suffers by the premature death of the father, nor to make that event a ground for diminishing its rights" (*Jus Feudale*, Lib. II., Dieg. 13, s. 15; Lord Clyde's translation II. p. 643).

This fiction has undoubtedly been adopted in the law of Scotland. I have already quoted Craig's approval of it in the sixteenth century. Writing in 1681 Stair in his *Institutions of the Law of Scotland* (III, v. 50) states that "in all things tending in favours of those unborn, they are accounted as

born." Bankton puts it thus: "A child in the mother's womb is esteemed as already born, in all things that concern its own interest, but is not reckoned among children, in relation to questions to the advantage of parents from a certain number of children" (Inst. I, ii, 7, and see also his Observations on the Law of England thereon, Inst. I, ii, 1, p. 72). Erskine in his Institute (III, viii, 76) gives the maxim in the shorter form: "Qui in utero est pro jam nato habetur quoties de ejus commodo quaeritur." A more recent and fuller statement of the Scots law on the subject is contained in the treatise on Wills and Succession (3rd ed., vol. I. p. 696) by the late Lord McLaren, who refers to "the doctrine of the Civil Law which has long been received in our system of jurisprudence, that a child born after the period at which the vesting of a right falls to be determined, but proved by the period of its birth to have been in utero at that time, is entitled to the rights of an existing person from the period of its conception. The leading case in the law of Scotland is that of *Mountstewart v. Mackenzie* (1), where the question was elaborately discussed, with reference to the rights of a child in utero to take as heir of provision in preference to a collateral substitute, and was decided in conformity with the rule of the Civil Law. The fiction of law, which treats the unborn child as actually born, applies only for the purpose of enabling the child to take a benefit to which, if born, it would be entitled; and therefore, where the right of a stranger is conditioned to take effect on the birth of a child within a certain time, the right will not accrue unless the child be actually born within the time limited."

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I have troubled your Lordships with these numerous authoritative citations in order to place it beyond doubt that according to the law of Scotland a child in utero is fictionally deemed to be already born only when the result of applying the fiction is to benefit the child when actually born, and that the fiction cannot be invoked in the interests of any third party. Your Lordships were indeed referred to one recent Scottish decision where the Second Division of the

(1) [1707] Morison's Decisions of the Court of Session, p. 14, 903.

H. L. (E.) Court of Session declined to apply the fiction, even although
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it was to the interest of the posthumous child to do so, because in the will there under consideration the testator had indicated with reiterated emphasis that only those children of his son who were born prior to the date of the testator's death were to participate in his bequest: *Burns's Trustees v. Burns*. (1) I confess that for myself I should not be disposed to approve this decision were it before your Lordships for review; I cannot see why the operation of the fiction should be excluded to the detriment of the posthumous child by the fact that the testator has several times and emphatically used the very language which brings the fiction into operation.

It is satisfactory for the purposes of the present case to find that the law of England in this matter is to all intents and purposes the same as the law of Scotland. The same fiction, derived from the same source in the Civil Law, and qualified by the same condition, is common to both systems. In the English case of *Villar v. Gilbey* (2) your Lordships' House had occasion to emphasize that the limitation, which the Court of Appeal had there discarded, was an essential part of "this peculiar rule of construction," which accordingly applies only where it is for the benefit of the unborn child to apply it.

Can it then be said that in the present case such benefit would result to the posthumous child from applying the fiction as to justify its application? It will be observed that if the fiction be applied the result is not to benefit the posthumous child but to benefit the estate of its deceased father. In the Courts below the benefit to the father's estate has been regarded as sufficient to justify the application of the fiction on the ground that a child naturally and normally benefits, albeit indirectly, by anything which enhances the assets left by its father. It is said that the posthumous child's interest as next of kin in his father's estate renders it to his interest that he should be treated as having been actually alive at his father's death. I may point out that the father having been domiciled in Scotland the posthumous son was

(1) 1917 S. C. 117.

(2) [1907] A. C. 139.

in any case entitled in name of legitim to an indefeasible right in one-third of his father's movable estate, testate or intestate, unless this right was excluded by marriage contract or otherwise discharged. But I am clearly of opinion that it is not an indirect or problematical commodum such as this that is meant in the limitation of the fiction. The commodum must in my opinion be the direct commodum of the posthumous child itself. The result of the application of the fiction in the interpretation of a bequest must be to bring the posthumous child within the benefit of the bequest as itself a participator. Any other view would render the rule uncertain and haphazard. It may no doubt be to a child's benefit that his father should die wealthy, but in England at least he may find himself cut off with a shilling by his father's will and so take no benefit from a construction which benefits his father's estate but does not benefit him. Or the father may be insolvent and the application of the fiction may benefit only the father's creditors and confer nothing on the posthumous child. And it might be almost equally said, if the destination-over brought into operation by the fiction sent the money to an aunt or a grandfather, that it was to the advantage of the posthumous child to have a wealthy aunt or grandfather, especially if he had the expectation of being an object of their bounty.

The sound view, in my opinion, is that the application of the fiction ought not to be at the mercy of such adventitious circumstances and that the commodum to the posthumous child must be a direct commodum to itself, resulting from the instrument under construction by virtue of the application to that instrument of the benevolent fiction in question; as, for example, to take the simplest case, where a testamentary gift is made to the children of X at the testator's death, and the result of the application of the fiction is to include a posthumous child among the beneficiaries.

I accordingly concur in the motion that this appeal be allowed, and an order made in the terms which my noble and learned friend Lord Russell of Killowen has proposed.

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Order appealed from set aside : Order of Clauson J. varied by inserting therein immediately after the words " now belongs " the words " as to one moiety thereof " and by adding at the end of the declaration therein contained the words " and as to the other moiety thereof to the defendant Robert Barnewall Elliot " ; and by striking out the order therein contained as to costs, and substituting in its place an order directing that the costs of all parties be taxed as between solicitor and client and paid out of the total funds before division into moieties ; and that subject to such variation the said order be, and the same is hereby, affirmed : Further ordered that the costs of all parties incurred by them in the Court of Appeal, and also the costs of all parties, other than James Kerr Elliot, incurred by them in respect of the appeal to this House, be taxed as between solicitor and client and paid out of the total funds before the division : And further ordered that the Cause be remitted back to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 14, 1935.

Solicitors for appellant : *Coulson & Coulson.*

Solicitors for the respondent J. G. G. Leadbetter : *Walker, Martineau & Co.*

[HOUSE OF LORDS.]

POWELL AND WIFE APPELLANTS ; H. L. (E.)*

AND

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STREATHAM MANOR NURSING HOME . RESPONDENTS.

Practice—Appeal—Trial before Judge alone—Question of Fact—Power of Court of Appeal to overrule Judge of first instance—Negligence—Personal Injury—Rules of Supreme Court, 1883, Order LVIII., r. 1.

By the Rules of the Supreme Court, 1883, Order LVIII., r. 1 :
“ All appeals to the Court of Appeal shall be by way of rehearing.”

Principles which should guide the Court of Appeal in hearing an appeal from the decision of a judge sitting without a jury under that Order, where the matter in question is matter of fact.

On such an appeal the Court of Appeal has to exercise its jurisdiction as a tribunal of appeal on matters of fact as well as on matters of law.

Where the question at issue is the proper inference to be drawn from facts which are not in doubt, the appellate Court is in as good a position to decide the question as the judge at the trial is.

But the appeal, although a rehearing, is a rehearing on documents and not, as a rule, on oral evidence ; and where the judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be ; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.

Kinloch v. Young 1911 S. C. (H. L.) 1 ; *Clarke v. Edinburgh Tramways Co.* 1919 S. C. (H. L.) 35 ; *SS. Hontestroom (Owners) v. SS. Sagaporack (Owners)* [1927] A. C. 37, approved and followed. Dictum of James L.J. in *The Sir Robert Peel* (1880) 4 Asp. M. L. C. 321, criticized.

APPEAL from an order of the Court of Appeal reversing the judgment of Horridge J. in an action commenced on June 21 before the learned judge and a special jury. On the second day of the trial at the request of counsel for both parties the jury were discharged and the action was tried by the learned judge alone.

* *Present* : VISCOUNT SANKEY L.C., LORD BLANESBURGH, LORD ATKIN, LORD MACMILLAN, and LORD WRIGHT.

H. L. (E.) The facts are stated in the judgment of Lord Wright.
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POWELL The following brief summary will indicate the nature of
AND WIFE the case :—The appellants were husband and wife. The
v. defendants carried on the business of a nursing home in the
STREATHAM name of the Streatham Manor Nursing Home, in which name
MANOR one of them, Mr. Gordon Hogg, had registered himself and in
NURSING which they were sued without objection. The female plaintiff
HOME. entered the defendants' Nursing Home to undergo the operation
of hysterectomy. Soon after the operation it was found that
her bladder had been punctured. Admittedly there was
no puncture before the operation. The plaintiffs brought
the action for personal injury done to the female plaintiff.
She gave evidence that one of the nurses at the Nursing Home
in attempting to relieve her of urine after the operation
used a rigid catheter and passed it, not into the urethra
(as she ought to have done) but into the vagina, and continued
forcing the catheter through the suture, which had been made
to complete the operation, until it perforated the bladder.
The defendants denied negligence and offered the explanation
that the bladder must have been punctured during the
operation. The learned judge believed the female plaintiff and,
as he stated, it was upon her evidence that he decided the
case. He took time to consider, and finally gave judgment
for 977*l.* for the male plaintiff and 2500*l.* for the female
plaintiff.

The defendants appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) reversed the judgment of Horridge J., adducing various reasons for concluding that the evidence of the plaintiffs was unworthy of belief ; among others (1.) the period of time, two years, that elapsed before the complaint was made of the injury ; (2.) the fact that a second injury (a hernia) was alleged by the plaintiffs and rejected by the learned judge ; (3.) the neurotic condition of the female plaintiff and its presumed effect upon her mind and memory ; (4.) the rare occurrence of such an injury in the course of removing a uterus ; (5.) the gross negligence which the plaintiffs' evidence attributed to a skilful and well trained

nurse. The Court placed great reliance on a passage from the judgment of James L.J. in *The Sir Robert Peel* (1), referred to by Lord Sumner in *Hontestroom (Owners) v. Sagaporack (Owners)* (2): "The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression." Upon these grounds the Court allowed the appeal and set aside the judgment of Horridge J.

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The plaintiffs appealed to this House.

1935. Jan. 17. *H. G. Robertson* and *S. K. D'A. de Ferrars* for the appellants.

H. C. Dickens and *C. Gordon Thompson* for the respondents.

Jan. 24. The House took time for consideration.

Feb. 28. VISCOUNT SANKEY L.C. My Lords, this is an appeal from an order of His Majesty's Court of Appeal (England) dated November 22, 1933, ordering that the judgment of Horridge J. dated July 11, 1933, in favour of the appellants, be set aside, and that the judgment in the action be entered for the respondents with costs.

The action was brought by the appellants, who are husband and wife, for damages caused to them by reason of the personal injury done to the female appellant by negligence, as the appellants alleged, of the respondents' servants or agents.

The appellant, Helena Powell, entered the respondents' Nursing Home on January 9, 1930, as a paying patient, and on January 20, 1930, Dr. James Kirkland performed the operation of hysterectomy upon her in the Home. This is an operation for the removal of the uterus.

The appellants' complaint is and was that on the following day—namely, January 21, 1930—the respondents' servant, Sister Hyndman, punctured the female appellant's bladder

(1) 4 Asp. M. L. C. 321, 322. (2) [1927] A. C. 37, 48, 50.

H. L. (E.) in negligently using and attempting to pass a catheter into her. There is no dispute that the bladder was not punctured before the operation. There is no dispute that it has been punctured. The respondents at the trial set up the case that it must have been punctured by Dr. Kirkland in performing the operation. This case is completely contradicted by, and at variance with, the evidence of the female appellant, and the learned judge accepted her evidence and based his judgment upon it.

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No question of law was raised at the trial or is involved in the appeal except in so far as it may be material to consider the functions of the Court of Appeal on appeal on a pure question of fact from a judge before whom at the trial conflicting evidence has been given by a number of witnesses whom he has not only heard but seen.

A number of witnesses were called before the learned judge, and the course of the trial resolves itself into three questions.

In order that the plaintiffs should succeed, it was necessary for them to establish the fact, to the satisfaction of the judge, that the puncture to her bladder sustained by the female plaintiff was due to the negligence of the nurses in attendance. If the proper deduction from the evidence was that the puncture had been made by the doctor who performed the operation, or if it was impossible upon the evidence to say in which way it was caused, the defendants were entitled to succeed, for then the plaintiffs would not have discharged the onus placed upon them. Several questions therefore become of vital importance. For example: (i.) was the puncture caused by the doctor who performed the operation? Upon this the learned judge had the direct evidence of the two doctors who were at the operation, both of whom said that the puncture was not caused on that occasion. There was also evidence, called by the defendants, of an expert character, as to the possibility or probability of a puncture being made by the operating doctor without his knowing it.

(ii.) Another question of vital importance was when the urine showed signs of escaping. Here again the matter was in controversy, first of all as to the time at which the escape

was noticed, secondly as to the exact time it was likely to have happened after the operation, if the puncture to the bladder had been made then. Upon these questions there was the direct evidence of the doctor and the nurses and also reports made by the nurses.

(iii.) There was the vital question as to what took place when the nurses tried to insert a catheter and the doctor was sent for. Upon this there was the evidence of the female plaintiff herself as to what happened and what she felt during the insertion of the instrument. On the other hand there was the evidence of the nurses as to what they did, as to the kind of catheter they used and as to the improbability or rather impossibility of a catheter of such a sort making a puncture. Over and above that, there was the delay in bringing the action and the letters written by the plaintiffs which seem to show that they did not at first attribute any negligence to the Nursing Home.

It is true that a Court naturally attaches great importance to letters written by a witness which appear to contradict evidence which he subsequently gives, but the Court must always take into consideration the witness's explanation of such letters and weigh it carefully. Further than that, an omission to state something in a letter may not be so weighty as a statement which contradicts something to which the witness subsequently deposes.

Upon these several matters the evidence was of a very contradictory character and no one could have been in as good a position as the learned judge who both saw and heard the witnesses to say where the truth lay. He expressly said that he accepted the evidence of the doctors, which, if true, proved that the puncture did not take place at the operation; that he accepted the evidence of Mrs. Powell, which, if true, made it almost conclusive that the puncture took place when the nurses tried to insert the catheter.

When the matter came before the Court of Appeal, the learned Master of the Rolls, founding himself upon the case of *The Sir Robert Peel* (1), dwelt with considerable force

(1) 4 Asp. M. L. C. 321, 332.

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H. L. (E.) upon another fact altogether. In *The Sir Robert Peel* (1) James L.J. said "the court will not depart from the rule it has laid down that it will not overrule the decision of the court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression." Originally in the present case there had been a claim for damages for a hernia which the female plaintiff alleged had been produced by one of the nurses allowing her to fall during her illness and so causing the hernia. The learned Master of the Rolls was evidently very much impressed by the fact that Horridge J. did not accept the female plaintiff's account of this, and he thought that the fact that the judge did not accept her evidence on this point was a governing fact, or at any rate one of the governing facts, to which great importance should be attached in considering the remaining part of her story.

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It is important carefully to consider what really happened with regard to this matter. The shorthand note clearly shows that the learned counsel for the plaintiff gave this point up because he thought it had not been proved that the fall caused the hernia, but he expressly said that he only did so without admitting that it made any difference to the rest of the female plaintiff's evidence. Upon this the learned judge agreed with him and indeed the counsel for the respondents regarded it of minor importance. The following is a transcript of what happened when the matter was given up. The learned counsel for the defendants said :

"A word again about the other branch of the case which had almost escaped me, the hernia."

Horridge J. : "I am not satisfied on that branch of the case, Mr. Hilbery, that the hernia resulted from this."

Mr. Malcolm Hilbery : "I do not say anything more about it provided it is satisfactorily understood that I must deal with it if it is said that it has any bearing upon the reliance which should be placed on Mrs. Powell's evidence or not."

Horridge J. : " I did not say that. I said I was not satisfied that if her evidence was true the hernia resulted from it."

Mr. Malcolm Hilbery : " It is really so much a minor matter in this case that I do not desire to say any more about it. I was intending only to say to your Lordship upon it that I was going to abandon it in the state of the evidence because I do not think the chain of causation is satisfactorily carried out provided it is understood that I am not casting any reflection upon or departing from the credibility of Mrs. Powell's evidence in any way."

Horridge J. : " Then you need not bother your head about that, Mr. Joy."

What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present ? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. There are different meanings to be attached to the word " rehearing." For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the Court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses :

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H. L. (E.) see *Clarke v. Edinburgh Tramways Co.*, per Lord Shaw (1),
 1935 where he says : " When a judge hears and sees witnesses and
 POWELL makes a conclusion or inference with regard to what is the
 AND WIFE weight on balance of their evidence, that judgment is entitled
 v. to great respect, and that quite irrespective of whether the
 STREATHAM Judge makes any observation with regard to credibility or
 MANOR not. I can of course quite understand a Court of Appeal that
 NURSING says that it will not interfere in a case in which the Judge
 HOME. has announced as part of his judgment that he believes one
 Viscount set of witnesses, having seen them and heard them, and does
 Sankey L.C. not believe another. But that is not the ordinary case of a
 cause in a Court of justice. In Courts of justice in the ordinary
 case things are much more evenly divided ; witnesses without
 any conscious bias towards a conclusion may have in their
 demeanour, in their manner, in their hesitation, in the nuance
 of their expressions, in even the turns of the eyelid, left an
 impression upon the man who saw and heard them which
 can never be reproduced in the printed page. What in such
 circumstances, thus psychologically put, is the duty of an
 appellate Court ? In my opinion, the duty of an appellate
 Court in those circumstances is for each Judge of it to put
 to himself, as I now do in this case, the question, Am I—
 who sit here without those advantages, sometimes broad and
 sometimes subtle, which are the privilege of the Judge who
 heard and tried the case—in a position, not having those
 privileges, to come to a clear conclusion that the Judge who
 had them was plainly wrong ? If I cannot be satisfied in
 my own mind that the Judge with those privileges was plainly
 wrong, then it appears to me to be my duty to defer to his
 judgment."

On an appeal against a verdict, if the evidence was such
 that no jury properly directed could reasonably have found
 the verdict in question, the verdict so found will be set aside.
 A verdict, however, will not necessarily be set aside merely
 because it is, in the opinion of the Court of Appeal, against
 the weight of evidence, but there is jurisdiction to grant a new
 trial in such a case : see *Solomon v. Bitton* (2) and *Metro-*

(1) 1919 S. C. (H. L.) 35, 36.

(2) (1881) 8 Q. B. D. 176.

politan Rly. Co. v. Wright (1), per Lord Halsbury. There is certainly jurisdiction in the Court of Appeal to reconsider the facts in the way they do reconsider them and to come to an opposite conclusion from that arrived at in the Court below. The judge of first instance is not the possessor of infallibility and, like other tribunals, there may be occasions when he goes wrong on a question of fact; but first and last and all the time, he has the great advantage, which is denied to the Court of Appeal, of seeing the witnesses and watching their demeanour. It is hardly possible to conceive a case where a judge of first instance could be more clearly in a better position than the Court of Appeal to judge where the truth lay than in the present case. There were contradictions on questions of fact between professional witnesses of high experience and standing, there were contradictions of expert evidence between similar witnesses who were not called as to fact, but as to their opinion. In circumstances like the present the Court of Appeal should be slow to upset the judgment arrived at by the judge who both saw and heard the persons who gave evidence.

Having regard to the facts, it is, in my view, quite impossible to say that the learned judge was wrong in coming to the conclusion he arrived at in favour of the plaintiffs, and I am for allowing this appeal and for restoring the judgment of Horridge J.

The appellants should have their costs in the Court of Appeal and the costs of the appeal to this House, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

LORD BLANESBURGH (read by LORD MACMILLAN). My Lords, I too have reached the conclusion that the judgment of Horridge J. in this most anxious case must be restored. I phrase in this way my concurrence in the motion just proposed, because I am thereby enabled to indicate, as is the fact, that my adhesion is not based upon any conviction of my own that the judgment to be restored was right, but is

(1) (1886) 11 App. Cas. 152, 155.

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given solely on the ground that sitting as I am in an appellate tribunal, and there deprived of the privilege of seeing, as the learned judge did, the witnesses on both sides, I have no sufficient justification for asserting with due regard to judicial prudence that the judgment was wrong.

It has, however, been with great difficulty that I have reached that conclusion: it is not without hesitation that I now express it. I have been gravely concerned by the long delay in the institution of proceedings and by the failure on the part of the appellants or of Dr. Kirkland, to make any kind of complaint to Mr. Hogg or to either Sister of any improper treatment of Mrs. Powell throughout a period of over two years during which Dr. Kirkland at least was in constant association with the Home and on terms of intimate friendship with Mr. Hogg.

I was, and I remain, gravely concerned by the resulting embarrassment to the defence. The production at the trial either of Mrs. Powell's temperature charts or of the catheters actually used by the Sisters upon her was thereby rendered impossible, and these productions, although they possibly could not have strengthened the appellants' case, as at the trial it presented itself to the learned judge, might well have ended it. I have been impressed, too, by the fact that rupture of the bladder by an india-rubber catheter was admittedly impossible, and that no such rupture by a gum elastic catheter has ever been known: I have been impressed by the payment by the appellants, long after Mrs. Powell had left the Nursing Home, of part of the remaining fees with an apology for non-payment of the balance and a promise to discharge it after the doctor's charges had been met, all this without a word of complaint: by the fact that when on March 8, 1932, that balance was asked for by a debt collector, the only complaint even then suggested was with reference to the hernia—a complaint in effect abandoned at the trial. I have been troubled, too, by the terms of Messrs. Bircham's letter of April 1, 1932, in which it is stated that it has now been "discovered beyond doubt that the bladder is perforated," suggesting, contrary to Dr. Kirkland's evidence, that the rupture, while it might previously have been suspected, had

only then been definitely ascertained : above all I have been struck by what on his own statement remains for me the entirely incomprehensible conduct of Dr. Kirkland during the whole period, and by the disturbing fact that not only did the learned judge accept his evidence apparently at its face value, but that he made it the buttress, if not the pillar, of his judgment.

These were, and some of them remain, for me very disturbing facts, the more especially as no one of them is either discussed or even referred to by the learned judge in his judgment. So serious indeed did they collectively appear to me that at one time since the hearing, in the course of my study of the case, I feared that judicial prudence, without at least some further support from the appellants' counsel by way of reply, would not be equal to the strain involved. In the end, however, difficult as I have found the journey to be, I have come to the conclusion I have stated, in agreement in its result with that of all your Lordships.

In these circumstances I feel that no useful purpose would be served by detaining the House with a recital of the detailed reasons justifying that conclusion which I had prepared. It will suffice if I say that the learned judge's definite finding, that the injury to Mrs. Powell was not done to her during the operation, is one which I have felt bound judicially to accept, supported as it is by the statement of Dr. Abrahams, who was present and whose complete impartiality is not questioned. With that finding accepted, the injury must, on the evidence, have been caused by the nurses or one of them, difficult as, for so many reasons, that conclusion remains.

One thing more only must I say. I regard it as being necessarily involved in a restoration of the judgment of Horridge J. that the burden thereby laid upon the respondents results from some act of proved negligence on the part of the two Sisters, or, of one of them in the presence of the other, on January 21, 1930. But in my view, at any rate, it does not *necessarily* involve any reflection upon what I may term the honour and humanity of Sister Hyndman and Sister Cooper, or of either of them. I accept from the learned

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H. L. (E.) judge the sincerity in every particular of Mrs. Powell as a witness. But her reliability or accuracy in this and in some other matters is a different question altogether, and in assessing both her strong, if natural, prepossessions after many years of suffering must not be left out of account.

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In this connection, nothing has impressed me more than the tributes of continued confidence and respect paid to the Sisters by every medical witness brought into contact with them, and even by Mrs. Powell herself. In my eyes, and I feel it to be my duty to declare it, nothing proved in this action leaves the slightest stain on the honour or humanity of either.

LORD ATKIN. My Lords, I have had the opportunity of reading the opinions of the Lord Chancellor and Lord Wright, and as I agree both with their statement of the law and their review of the facts, I should add nothing were we not differing from the Court of Appeal. I have not had the opportunity of seeing in advance the opinion of my noble and learned friend Lord Blanesburgh which has just been read. If I had I should have felt bound to indicate that in several respects I do not share the view of the facts which has recommended itself to my noble and learned friend.

The case involves only an issue of fact very closely defined. The plaintiff was injured in the Nursing Home, either by the surgeon at the operation between 11 and 12 noon on January 20 or by the nurse about 7 P.M. on January 21. She would feel the effects of the injury within a few hours of the operation if the surgeon was at fault: at once if the nurse was at fault. It is in the ordinary course unusual that the injury should be caused in either way either without the knowledge of the surgeon in the first instance or in the process of catheterizing by a competent nursing Sister such as the Sister in this case was proved to be. But as the injury certainly did happen in one or other of the two ways common, inherent improbability is of little weight. The case resolved itself into an issue between the credibility of the patient and the surgeon on the one hand, and nurses on the other. The judge who saw the witnesses believed the former.

I venture to think that such a finding in such a case precluded any successful appeal. I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong: it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the judge who saw and believed. And in no cases should this advantage be more readily recognized than in cases which involve character and reputation.

I agree with all your Lordships in thinking that in the present case the Court of Appeal were not justified in differing from the findings of the trial judge, based as they expressly were upon his opinions of the credibility of the plaintiff and the surgeon. In particular I think that there was no sufficient ground for expressing strong views about the untruthfulness of Dr. Kirkland, whom no member of the Court of Appeal had seen giving evidence, while he was believed by the judge who saw him. I have already said that the Court of Appeal are unrestricted in their jurisdiction in appeals, and it seems to me unfortunate that they should be entangled by any formula as to their powers. But if any formula were adopted I cannot imagine any more unsatisfactory or of so limited a scope as that adopted from James L.J. in *The Sir Robert Peel*. (1) In fact, however, it seems plain that the governing fact relied on by the Master of the Rolls is based upon a misunderstanding of the judgment of the trial judge, who expressed no opinion upon the credibility of the plaintiff as to the facts which it was suggested caused the hernia. I have not tried to form

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(1) 4 Asp. M. L. C. 321.

H. L. (E.) any opinion as to what judgment I should have given if I had seen the witnesses myself. I find no reason for rejecting the findings of the very experienced judge who had that advantage, and I agree that this appeal should be allowed.

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LORD MACMILLAN. My Lords, I have shared to the full the anxiety which your Lordships have felt in disposing of this appeal, involving as it does questions of grave moment to the parties. The evidence presents a direct conflict of oral testimony on a pure issue of fact. If the judgment given in the plaintiffs' favour in the Court of first instance had been based on the verdict of a jury your Lordships' task would have been relatively easy, for there was plainly ample evidence on which a reasonable jury could have found for the plaintiffs and the verdict must have stood.

But the case was tried by a judge sitting alone, and on appeal from the decision of a judge the Court of Appeal and this House have a duty to exercise their jurisdiction as tribunals of appeal on fact as well as on law, a jurisdiction which your Lordships have never hesitated to exercise when satisfied that the Courts below have erred on a question of fact. Where, however, as in the present instance, the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error. The reasons for that reluctance have been expounded by your Lordships who have preceded me. They are founded on common sense, and they are nowhere better stated than by Lord Loreburn L.C. in the case of *Kinloch v. Young* (1), from whose speech I take leave to quote the following passage :—

“ Now, your Lordships have very frequently drawn attention to the exceptional value of the opinion of the judge of first instance, where the decision rests upon oral evidence. It is

(1) 1911 S. C. (H. L.) 1, 4.

absolutely necessary no doubt not to admit finality for any decision of a judge of first instance, and it is impossible to define or even to outline the circumstances in which his opinion on such matters ought to be overruled, but there is such infinite variety of circumstances for consideration which must or may arise, and it may be that there has been misapprehension, or that there has been miscarriage at the trial. But this House and other Courts of appeal have always to remember that the judge of first instance has had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of appeal. Even the most minute study by a Court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.”

My Lords, I have had an uneasy feeling, as I listened to the able arguments of counsel in this appeal, that I was remote from the poignant realities of the case and that I was being asked, as it were, to dispose of the fate of the parties in their absence. It is only the written evidence which reaches this House; the other evidence which the judge of first instance tells us that he has relied upon cannot be reproduced or subjected to review here, and I have never felt more conscious of the disability imposed by the absence of this aid to judgment.

My Lords, I should nevertheless be ready to differ from the decision of Horridge J. if the criticisms to which it has been subjected in the Court of Appeal and at your Lordships’ bar had carried conviction to my mind that he had gone wrong. But these criticisms have not convinced me, as they have not convinced your Lordships, and I am of opinion that no sufficient reason has been shown for departing from the decision of the experienced trial judge who enjoyed the advantages denied to your Lordships and who manifestly devoted the utmost care to the consideration of the case. I accordingly concur in the motion that his judgment be restored.

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LORD WRIGHT. My Lords, this appeal is from a judgment of the Court of Appeal, reversing a judgment of Horridge J., who had awarded the female appellant, Mrs. Powell (whom I shall hereafter refer to as "the appellant"), 2500*l.* with costs, and the male appellant, Mr. Powell (whom I shall refer to as "the husband"), 977*l.* with costs. The case was tried by the judge alone, a special jury who had been empanelled having been discharged at the joint request of both parties after the end of the first day.

The respondents are the proprietors of a nursing home and were sued, without any formal objection, as the Streatham Manor Nursing Home. The appellant became a patient of the Home: on January 20, 1930, the operation of hysterectomy was there performed upon her by Dr. Kirkland, an experienced medical practitioner of thirty-eight years' standing, who had performed this operation almost 200 times. Subsequently she suffered from a leakage of urine, which in fact was due to her bladder having been punctured.

It is not contested that this puncture must have been caused in one or other of two ways, that is, either in the course of the operation or on the next day when attempts were unsuccessfully made by the Sisters of the Home to catheterize her. On the material issues there was a direct and serious conflict of oral testimony: the judge, after hearing the case for nine days, decided in favour of the appellants: he expressly says: "I believe the plaintiff Mrs. Powell and it is on her evidence I decide this case." The Court of Appeal were of opinion that he was wrong in so deciding and in believing the appellant, mainly, it seems, on their view of the probabilities of the case and, in a less degree, on some inconsistencies which they observe in her evidence and in that of Dr. Kirkland, who gave evidence on her behalf. They set aside the judgment of Horridge J. and entered judgment for the respondents with costs.

The case is both difficult and unusual: it is important in respect of the particular interests of the parties and is also of general importance because of the discussion which has taken place before this House on the proper functions of the Court

of Appeal, on hearing an appeal from the decision of a judge sitting without a jury, where the case is purely one of fact, and the trial judge has based his judgment on the conclusion he has formed as to which of the witnesses, whom he has seen and heard, are trustworthy and which are not.

It will be convenient to recapitulate briefly the salient facts. The appellant entered the Nursing Home eleven days before the operation; she had been suffering from pain for some time, but the operation was to all appearance successfully performed. Sometime next day it was deemed necessary to relieve her bladder by the use of a catheter. Her story, which the judge accepted as true, was that about 5 P.M. that day she felt very distended and begged to be relieved; after some delay the two Sisters, Sister Hyndman and Sister Cooper, came, it being then about 7 P.M., the former carrying a kidney bowl with two catheters: Nurse Jones was also present: Sister Hyndman attempted to pass a catheter which looked stiff and rigid: the appellant cried out in pain, but the Sister went on trying with the same agonizing result. I go on to quote from the judgment which proceeds to set out the appellant's evidence. "After this she inserted her two fingers into the vaginal cavity and said to Sister Cooper: 'This is the urethra, I cannot understand why it will not go in.' I implored of her again to leave me alone and send for the doctor but she lost her temper and said: 'Are you the first woman I have ever done?' I said: 'No, I shall be the last.' She still insisted on passing the catheter. I could not say where she passed it but she was pricking me at every prod and I am positive it was not in the urethra. She again lost her temper and threw a towel over my face which I immediately removed and she attempted to pass the catheter again. I said: 'Do leave me alone, you are hurting me; I have been done before and I know it does not hurt.' She turned to me and said: 'Shut up, Mrs. Powell,' and gave me a forceful prod which made me scream out in pain. I next heard Sister Cooper in a muffled voice tell Sister Hyndman saying: 'There is blood coming,' and Sister Hyndman to put me off the scent said: 'I will try another catheter,' I immediately said:

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‘ You will do no such thing and send for the doctor.’ After this Sister Hyndman and Sister Cooper left the room together, but Sister Cooper before leaving put a pad of cotton-wool underneath me to catch the urine that was running from me and causing a burning sensation. The relief was considerable. Nurse Jones was about to leave the room when I said : ‘ They have damaged me, show me that kidney bowl.’ She refused at first and said she would get into trouble but I insisted and she showed me. In the kidney bowl were two catheters, one soft and one hard, also urine streaked with blood. I turned to Nurse Jones, as I was crying a great deal of the time from the pain I had been subjected to, and she put her hand on my shoulder and said : ‘ Never mind, Mrs. Powell, the doctor will soon be here.’ They had already then given me about twenty minutes’ agony in attempting to pass the catheter. The catheter which was tried to be inserted was cold and had no temperature.” Mrs. Powell also said that Sister Hyndman did not put a swab in her vagina and that no swab was put in the parts at all.

The judge then went on to observe that the account as given by the witnesses for the defence was entirely different : he then proceeded as follows : “ I wish to put my judgment on the fact that having heard all the witnesses for the defence I am satisfied Mrs. Powell’s account of the occurrence is true and accurate, and that the injury was sustained or occasioned by the negligence of Sister Hyndman passing a catheter into her vagina instead of her urethra and in that way puncturing through the suture made at the operation and into the bladder. Sister Hyndman stated one of the things you are warned about when you are out to catheterize is the danger of getting the catheter into the vagina and I am satisfied that Mrs. Powell was a witness of truth as to this having happened on this occasion.”

It seems clear that if the judge is right in accepting the evidence of the appellant as true and accurate, the injury to the bladder must have been caused by the negligent conduct of Sister Hyndman. If the appellant suffered from distension of her bladder on the day after the operation, her bladder

cannot, as I understand the medical evidence, have been punctured on the previous day in the course of the operation. The evidence of the Sisters and of the two nurses called by the respondents was that leakage of urine from the appellant had been observed about ten hours after the operation and had continued thereafter until the appellant left the Home as she did on February 12, 1930: they say that they attributed that leakage to overflow or incontinence of urine due to her nervous state; as soon, however, as it was ascertained that the leakage was per vaginam, it followed that the leakage must have been due to a puncture, which, say the respondents, must have been caused by Dr. Kirkland when he was operating. No doubt it is true that, during the operation of hysterectomy, it may happen that the surgeon punctures the bladder, though he ought to be aware that he has done so and then he must immediately sew up the puncture: but the judge said that Dr. Kirkland and his assistant, Dr. Abraham, who was also present at the operation, had satisfied him by their evidence that no such accident occurred. There was a direct conflict between the evidence of the appellant and Dr. Kirkland on the one hand, and of Sister Hyndman and Sister Goodman on the other as to when the attempt by them or one of them to catheterize the appellant was made: the Sisters say that it was made at about 1.30 or 2 P.M. and that they telephoned Dr. Kirkland about 2 P.M.; Dr. Kirkland says he received no message till about 7 P.M. and came immediately, and the appellant also puts the attempt at about 7 P.M.: the judge has accepted the latter account as true: the medical evidence is that it would be a grave breach of duty for a doctor, receiving such a message, to wait and not go at once. The injury to the bladder, which was observed by means of suitable instruments some time afterwards, was then seen to be in the vaginal wall in the region of the suture line, where the flaps of the severed uterus had been sewn together, close up against the bladder: if the injury to the bladder was due to the use of the catheter, the catheter must have penetrated through the suture line and impinged on the surface of the bladder and so made a puncture through it. The eminent surgeons called on both

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sides had not heard of any case in which this accident had happened : but it is not said by any of them that it is impossible that it should have happened. On the other side there is the admitted fact that the attempts by the Sister or Sisters to catheterize failed, whereas Dr. Kirkland admittedly, when he came, succeeded in catheterizing without difficulty. Nurses are warned of the danger of inserting the catheter into the vagina instead of the urethra ; the story told by the appellant is consistent with this having been done in her case : no serious theory was advanced to explain how there could have been any obstruction such as the Sisters say was experienced when they attempted to catheterize, that is, on the assumption that the attempts were made by the urethra ; whereas, however improbable the occurrence may be, it was not impossible that the injury might have been caused if the catheter had been by inadvertence inserted through the vagina. No doubt it is strange that this error should have been made twice : nor could the injury have been caused by the catheter if it was a rubber catheter, as the respondents' witnesses say it was : but both the appellant and Dr. Kirkland say the catheter was stiff and rigid and the judge has accepted their evidence on this point also.

There are further matters of controversy in this difficult case and further probabilities or contentions on the one side or the other, to some of which I shall advert later, but it is sufficient here to repeat that if the story told by the appellant as to her actual experiences is true, it would indicate damage to the bladder caused (though in a manner apparently unprecedented) by the use of the catheter : and that her evidence, if accepted, as it was by the judge, that she suffered from distension of the bladder earlier in the day negatives the possibility of her bladder having been punctured during the operation. On the other hand, if there was in fact a leakage or escape of urine, as the nurses say, starting on the evening before and continuing, and that leakage was per vaginam, the puncture of the bladder which caused the leakage must have been caused during the operation. As the judge fully appreciated, he could not escape from the

responsibility of coming to a decision on the direct conflict of evidence. H. L. (E.)

Before I turn to consider the reasoning which led the Court of Appeal to reverse the conclusions of fact arrived at by the judge, it is necessary to examine what are the principles which have been established to regulate the duty of the Court of Appeal in cases such as the present. The essence of the matter is now contained in the initial words of Order LVIII., r. 1 (which has statutory effect), which are as follows: "All appeals to the Court of Appeal shall be by way of rehearing." These words apply to an appeal from the decision of a judge sitting without a jury. The position is different when the trial has been with a jury. Where the trial has been before a judge alone the rehearing is had on the evidence given before the judge, except in the rare cases where further evidence has been permitted to be called before the Court of Appeal: that may be done under r. 4, which enables this course to be taken on "special grounds only, and not without special leave of the Court." In effect, therefore, the rehearing is very different from the original hearing: it is a rehearing on documents, including the judge's notes and sometimes, as in this case, also the shorthand notes, whereas the judge who originally heard the case both saw and heard the witnesses, and during an examination and cross-examination, often prolonged and searching, had abundant opportunity of forming an opinion as to their relative trustworthiness or the reverse. A rehearing of this character is essentially different from the rehearing which takes place on an appeal to Quarter Sessions: on that latter appeal the witnesses are called and give their evidence afresh, as if there had been no previous trial: there is also this further difference that at Quarter Sessions the appellant does not open the appeal, but the complainant, even though respondent on the appeal, begins: the hearing on the appeal proceeds on the same course as the original hearing; whereas on a rehearing by way of appeal under Order LVIII., r. 1, the order of opening the case may be transposed: the appellant even if defendant below opens the appeal and develops his case, putting together such select passages from the judge's

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But the appeal under Order LVIII. is still a rehearing and as such differs from appeals from judgments of judges of county courts or upon cases stated by justices under certain statutes ; as to these latter, reference may be made to what was said by Lord Atkinson in *Folkestone Corporation v. Brockman* (1) : in these latter cases the Court of Appeal is not a judge of fact in any sense : its powers of review are limited to cases where judgment has been given without evidence and therefore without jurisdiction or under error in law. The case of an application for a new trial or to set aside a verdict after trial with a jury, again involves different considerations and need not be considered here. In all these latter cases the Court of Appeal is not the judge of fact.

But under Order LVIII. the Court of Appeal is the judge of fact. Here, however, arises the crucial circumstance that the Court is the judge of fact with what may be a vital difference as compared with the trial judge, since the rehearing which it conducts is under the different conditions which have been explained. What consequences properly follow from that have been stated in several cases : the latest and fullest statement of the relevant principles is now to be found in the opinion of Lord Sumner (which was the opinion of the House) in *Hontestroom (Owners) v. Sagaporack (Owners)*. (2) That was an Admiralty case and the authorities cited by Lord Sumner were decisions in Admiralty appeals ; indeed these questions could not have arisen before the Supreme Court of Judicature Act, 1873, in cases at common law, in which the jury alone was the competent judge of fact. Lord Sumner states the antinomy which arises when the Court which is judge of fact has neither seen nor heard the witnesses and discusses how it is to be reconciled. He says (3) : " Of course, there is jurisdiction to retry the case on the shorthand note, including

(1) [1914] A. C. 338, 362.

(2) [1927] A. C. 37, 40.

(3) *Ibid* 47.

in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case." He adds a little later: "If his" [the trial judge's] "estimate of the man" [the witness] "forms any substantial part of his reasons for his judgment the trial judge's conclusion of fact should, as I understand the decisions, be let alone." Lord Sumner quotes to the same effect earlier Admiralty authorities, both before and since the Judicature Act.

But in my opinion the same principles apply in ordinary common law cases: indeed in a personal injury case which came on appeal from Scotland to this House the rule was enunciated in analogous terms. That was the case of *Clarke v. Edinburgh and District Tramways Co.* (1) Lord Buckmaster said that Courts of Appeal should not seek anxiously to discover reasons adverse to the conclusions of the learned judge who has seen and heard the witnesses and determined the case on the comparison of their evidence. Lord Wrenbury said that the trial judge was in a position of advantage which he as an appellate judge did not possess. Lord Shaw dwelt on the important effect of indications to be drawn from witnesses' manner and deportment.

Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal "must, in order to reverse, not merely entertain

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(1) 1919 S. C. (H. L.) 35, 36.

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doubts whether the decision below is right, but be convinced that it is wrong": (*The Julia* (1), per Lord Kingsdown, cited with approval by Lord Sumner. (2) And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. Lord Sumner protested against such a course being taken: he thus stated (3) what were to his mind the proper questions which the appellate Court should propound to itself in considering the conclusions of fact of the trial judge: " (1.) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence? (2.) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3.) Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact, which in relation to others has created a wrong impression,' or any specific misunderstanding or disregard of a material fact, or any 'extreme and overwhelming pressure' that has had the same effect?" Lord Sumner in his reference to "a governing fact" is quoting what was said by James L.J. in *The Sir Robert Peel* (4): I have found it difficult to appreciate the precise application in that case of this observation. The Court of Appeal there affirmed the decision of the trial judge on a question of the admissibility of evidence, and I can see nothing in the argument or in the facts as reported which raised this question. Furthermore the dictum of James L.J. does not appear by itself to constitute any full or even useful enunciation of the principles which should guide the Court of Appeal, unless indeed qualified and supplemented as it is by Lord Sumner. I do not understand that Lord Sumner is laying down any precise rules of universal application. I think that it is difficult, if not impossible, to seek to lay down any

(1) (1860) 14 Moo. P. C. 210, 235.

(2) [1927] A. C. 47.

(3) Ibid. 50.

(4) 4 Asp. M. L. C. 321.

precise rule to solve the problem which faces the Court of Appeal when it has to act as a judge of fact on the rehearing, but finds itself "in a permanent position of disadvantage as against the trial judge." In truth, it is not desirable, in my opinion, to do more than state, as I think Lord Sumner was stating, principles which will guide the appellate Court in the majority of such cases. The problem in truth only arises in cases where the judge has found crucial facts on his impression of the witnesses: many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse. He will not necessarily distrust a witness simply because he finds him inaccurate in some details: he can give such inaccuracy its proper place, particularly if he sees that the witness is tired, or antagonized, or confused, or perhaps impatient, and especially if the matter of the inaccuracy is of minor or collateral importance. But such inaccuracies may appear in a very different light when pointed to as isolated passages in the shorthand notes and abstracted from the human atmosphere of the trial and from the totality of the evidence. The judge will form his impression from the whole personality of the witness: he can allow for the nervous witness, standing up in a crowded Court or worried by the strain of cross-examination. The judge may be deceived by an adroit and plausible knave or by apparent innocence: for no man is infallible; but in the main a careful and conscientious judge with his experience of Courts is as likely to be correct in his impressions as any tribunal, unless perhaps, as some would say, a jury of twelve members is preferable. Yet even where

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H. L. (E.) the judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact ; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions may be determinant and indisputable facts, and the same may be true of some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witness ; such cases have occurred in the experience of most judges and are covered by the third question propounded by Lord Sumner.

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When I seek to apply these principles to the present case I find myself unable to accept as sufficient the reasoning which has led the Lords Justices to reverse the decision of the trial judge. I trust that in the brief summary which alone is possible here, I shall do no injustice to their elaborate and careful judgments. I have only extracted from these judgments enough to explain why I find it impossible to agree with their reasoning. I shall also have to advert briefly to some parts of the evidence which up to now I have felt able to ignore. As the judgments of the Court of Appeal agree in the main, I do not think it necessary to discuss each individually.

Their general tenor is that the appellant's story is not credible, but they lay stress on certain more general aspects. Thus I may refer in the first place to their view of the improbability that the puncture should have been caused in the attempt to catheterize, made by Sister Hyndman with the help of Sister Cooper : it is more probable in the view of the Court of Appeal that the injury was done by Dr. Kirkland while operating : and it is said that the appellant's evidence of her subjective feelings or her experiences so soon after a major operation cannot be regarded as accurate, especially in view of the evidence as to her nervous condition before the operation and the fact that she was receiving injections of morphia from time to time. But all the evidence is that she was quite sensible at the material times, as Sister Hyndman herself says. I cannot find evidence of any kind to the contrary and I do not see how I can speculate. The judge

has found that her story is true in fact : that finding must be dealt with. The Court of Appeal cannot proceed as if no such finding exists. On the other side of the picture they do not seem to have given any heed to the undoubted fact that the failure of the attempt by the Sisters to catheterize calls for explanation. That in itself is an arresting fact ; the very careful evidence of the eminent surgeon, Mr. Hedley, evidently accepted by the judge, disposes of the only explanation tendered of this unusual occurrence.

In the next place, great stress is laid in the Court of Appeal on the fact, at first sight, and perhaps on any view, calling for explanation, that no claim was made against the respondents for more than two years after the appellant left the Home : and further that even then the letter of claim first sent did not complain at all of the puncture of the bladder, but only mentioned the minor claim that the appellant had been negligently dropped by the night nurse and had thereby sustained a hernia. These facts are to be treated, in the opinion of the Court of Appeal, as constituting a "glaring improbability" such as Lord Sumner envisages (1), and as being fatal to the judge's conclusion. I cannot accept this argument. The judge deals with the difficulty shortly, but as I think sufficiently, in these terms : "Considerable comment was made on the delay which occurred before any claim was made, but it is amply explained by the circumstances of the terrible condition in which the plaintiff Mrs. Powell was and by the doctor's desire not to encourage her in any way to make a claim against this Home with which he was himself associated and of which Mr. Hogg, who was a great personal friend of his and with whom he had been away for two holidays, was the secretary. I have seen the witnesses and accept their evidence as to the delay." When this delay is spoken of as a glaring improbability, it must be inquired what is the standard of probability to be taken. Is it that of the normal man in normal circumstances, if such an abstraction is conceivable ? Any such standard would obviously be fallacious, since the true question can only be what was probable if you take, as

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 Lord Wright. } circumstances in which they were. I can see no reason to
 reject the judge's conclusion, even if it were competent for me
 to speculate on probabilities of this kind. I observe that the
 first letter of complaint was followed in a few days by a letter
 setting out the full complaint, and in a few days more by a
 letter from the appellant's solicitors. On the other hand it
 may be noted that the reply from the respondents' solicitors
 to that letter stated that it had been impossible for the nurses
 to approach the appellant and insert a catheter at all, as the
 appellant was so tender. This was in April, 1932. It was not
 till the following July that the respondents' solicitors wrote
 correcting that statement: the respondents were no doubt in
 a position of some difficulty owing to the lapse of time;
 sometimes in such cases reconstruction takes the place of
 recollection.

Another matter emphasised by the Court of Appeal is that
 the claim for the hernia is rejected by the judge, and that is
 described by the Court of Appeal as "a touchstone of the
 validity and credibility of the plaintiff's story." The matter
 is dealt with very shortly by the judge in his judgment, but
 your Lordships, like the Court of Appeal, have been provided,
 not only with the judge's very full and careful notes, but
 with the shorthand notes of the evidence and of counsels'
 speeches. It is clear from these that the judge believed the
 appellant's story both as to the fact that she had the hernia
 and that she was negligently dropped on the bed by the night
 nurse in the way she describes: these indeed are all the facts
 to which she speaks in her examination-in-chief. In cross-
 examination she states that the hernia resulted from the fall.
 This is a matter of inference which on the medical testimony
 the judge refuses to draw. But I fail to see how all this can
 afford a ground for treating the appellant's evidence as
 incredible.

To turn to the consideration of the general probabilities of
 the case by the Court of Appeal, they appear to be of opinion
 that it is much more likely that Dr. Kirkland would cause the
 puncture in the operation (which indeed on the evidence he

might do without negligence, though he ought to notice it) than that the Sisters should be guilty of what is described as "brutality" almost amounting to a criminal assault, or that being experienced nurses they should be guilty of such negligence and that their story should consequently be believed. If the inquiry is to be which story is the more probable, then I may confess, as Lord Sumner did, that "I am a poor hand at answering that kind of question." (1) What is undoubtedly suggested is that Dr. Kirkland, knowing he had caused the injury, was inventing a story and prompting the appellant to tell it and was putting the blame on the Sisters, when he found that he could no longer keep the appellants quiet or keep them from making a claim. It is said in the Court of Appeal that his evidence is "a mass of inconsistency and improbability." I can only observe that, apart from the fact of his professional standing, he was, after being cross-examined at great length, believed by the judge. To my mind it would be unjust, after this, to seek to convict him on paper. As to the Sisters, especially Sister Hyndman, their conduct, if the view of the judge is accepted, is capable of a much more charitable construction than could on the other theory be applied to Dr. Kirkland, if the view adverse to him were adopted. The appellant herself speaks throughout of Sister Hyndman as having been kind to her: the appellant's belief that she had been damaged is not inconsistent with absence of animosity. Sister Hyndman is spoken of as fully competent. In any case the judge heard them fully before he decided. I do not advert to features of the evidence which on any view are curious, such as the Sister's statement that until the claim was made in March, 1932, she had no idea that the constant leakage of urine experienced by the appellant was due to anything other than nervous incontinence, or the evidence of Dr. Kirkland that before he catheterized the appellant, he examined the parts and saw that the urine was leaking per vaginam and diagnosed that the bladder had been punctured by the attempts to catheterize, but did not mention it at the Home till next morning and then not to Sister Hyndman, and

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did not for some time discuss it with the appellants. No doubt the case presents many difficulties, but that is no ground to justify reversing the decision of the trial judge.

I have not thought it necessary to refer to other minor matters, which are mentioned as significant in the judgments of the Court of Appeal: in particular in the judgments instances are given somewhat remote from the crucial occurrence which are said to show that the appellant's recollection of what happened to her at the Home cannot be relied on. I have examined these instances (all of which occur in the course of a long cross-examination) in the shorthand notes and can understand how in each case the judge, even if he thought there was inaccuracy, as there may have been, might well think that her general trustworthiness was not discredited. But some of the appellant's answers of this character may well be explained by misunderstanding.

It is not in my opinion necessary to examine the evidence more minutely. I think I have done so sufficiently to show why in my judgment nothing has been established, either in the judgments of the Court of Appeal or in the able and strenuous arguments enforcing those judgments which counsel for the respondents have advanced before your Lordships, of such a character as to constitute either any specific misunderstanding or disregard of a material fact or any extreme and overwhelming pressure, or any governing fact, or in any way to justify reversing the decision of the very learned and experienced judge who heard the case for nine days. I do not say that it was not a difficult case. I am not seeking to retry the case *de novo* and as if there had been no trial before the judge. I do not know, nor is it material that I should know (if indeed I could), how I should have decided the case if I had tried it myself. It is enough to say that I am not convinced that the judge was wrong.

VISCOUNT SANKEY L.C. My Lords, before putting the question I feel I ought to say that I too had no opportunity of seeing the opinion of my noble and learned friend Lord Blanesburgh before it was delivered. I must add that I agree

with the remarks upon it made by my noble and learned friend Lord Atkin. H. L. (E.)

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Order of the Court of Appeal complained of, except in so far as it directed that the sum of 2500l. should be paid to the defendants or their solicitors on their authority, reversed: Judgment of Horridge J., thereby set aside, restored: Ordered that the respondents do pay to the appellants the costs incurred by them in the Court of Appeal and in respect of the appeal to this House, the said costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis: Further ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

Lords' Journals, Febr. 28, 1935.

Solicitors for appellant: *Bircham & Co.*

Solicitors for respondents: *Hempsons.*

July 3, 1930, under the name of the Long Acre Syndicate, H. L. (E.)
 Ltd. Pending its formation Mr. Barton and M. Guitry's
 agent, one H. F. Howell, entered into an agreement for a
 licence to perform the play on payment of royalties, one of the
 terms of the agreement being that on the signing thereof
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 royalties thereafter stipulated.

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On June 23, 1930, Mr. Barton called upon the appellants, who acted as solicitors for him and, after its incorporation, for the company, and instructed them to forward the agreement in duplicate to Mr. Howell, and out of moneys which had been placed in their hands on account of the proposed company, and of which at that date Mr. Barton had the disposal, to pay the sum of 300*l.* in accordance with the above mentioned term of the agreement.

Accordingly, on the same date the appellants forwarded the agreement in duplicate to Mr. Howell together with their cheque for 300*l.* and a letter in the following terms: "Dear Sir—Mr. Sacha Guitry & Mr. Lionel H. Barton—'Desire'—Long Acre Syndicate—

"On the instructions of Mr. Barton we enclose the two parts of the agreement, one of which has been executed by him, together with our cheque for 300*l.* (the amount of royalties in advance under clause 3) and should be glad if you would kindly return the other part to us signed by Mr. Guitry as early as possible, as the play is billed for production at the New Theatre on July 2."

The cheque for 300*l.*, which was drawn payable to Mr. Howell, was cashed in due course. The production of the play resulted in a loss to the company, and in the events which happened no further sums were paid or payable to M. Guitry on account of royalties in respect of the performance of the play.

When the question of income tax was subsequently raised by the Revenue authorities, the appellants tried to persuade Mr. Barton, M. Guitry and Mr. Howell to pay the tax, but their efforts were unsuccessful. It was common ground that M. Guitry's usual place of abode was not within the United

H. L. (E.) Kingdom, and that the sum of 300*l.* paid to him was a payment on account of royalties paid in respect of a copyright of which M. Guitry was the owner.

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The appellants were assessed to income tax in the sum of 300*l.* for the year ending on April 5, 1931, under the provisions of s. 26 of the Finance Act, 1927, as extended by s. 25 of that Act. They appealed against the assessment. The Commissioners for the Special Purposes of the Income Tax Acts confirmed the assessment, but under s. 149 of the Income Tax Act, 1918, stated for the opinion of the King's Bench Division a special case, which set forth the foregoing facts.

The appellants contended that they were not persons by or through whom any payment giving rise to liability to tax was made, and that they were not liable to account to the Revenue for income tax on the sum of 300*l.* paid to M. Guitry.

On behalf of the Crown it was contended that the appellants were persons through whom the sum of 300*l.* had been paid to M. Guitry on account of copyright royalties, and that as such they were chargeable to income tax under r. 21 of the Rules applicable to all Schedules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, and applied to copyright royalties by s. 25 of the last mentioned Act. (1)

(1) Rule 21 of the All Schedules Rules of the Income Tax Act, 1918 :—

"(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment."

Finance Act, 1927, s. 26, sub-s. 1: "Rule 21 of the General Rules shall be amended

by the substitution of the following paragraphs for paragraph (2.) thereof :—

"(2.) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment of which an account is so delivered on that person."

Finance Act, 1927, s. 25, sub-s. 1: "Where the usual place of abode of the owner of a copy-

The special case was heard before Finlay J., who affirmed the decision of the Special Commissioners. The appellants appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) dismissed the appeal.

Hence this appeal.

March. 1. *Croom-Johnson K.C.* and *P. B. Showan* for the appellants.

Sir Thomas Inskip A.-G. and *R. P. Hills* were present on behalf of the respondents, but were not called on.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

LORD ATKIN. My Lords, this appeal raises a simple question and one which I venture to think admits of only one answer. It has been answered in the same way by the Commissioners, by Finlay J. and by the Court of Appeal, and I agree with the answer which they have given. It is a case in which there was an agreement between a Mr. Barton in London and M. Sacha Guitry, of Paris, by which Mr. Barton agreed to produce a play of M. Guitry's on terms that he was to pay certain royalties, and one of the terms of the agreement was that on the signing of the agreement he was to pay a sum of 300*l.* "on account of the royalties hereinafter stipulated." Messrs. Rye & Eyre, the appellants, who are solicitors, and who were acting as solicitors for Mr. Barton, having certain funds in their hands which Mr. Barton was in a position to direct them to apply for this particular purpose, were directed by him to pay the 300*l.* on account of royalties to M. Guitry, which they proceeded to do at the time when they enclosed the agreement signed by their client.

It is now sought by the Crown to make them liable for income tax in respect of that sum, and the material paragraphs

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right is not within the United Kingdom, Rule 21 of the General Rules shall apply to any payment of or on account of any royalties or sums paid periodically for or in respect of that copyright as it applies to annual payments not payable out of profits or gains brought into charge." . . .

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of the relevant Rules which it is contended make the solicitors liable are these. Rule 21 of the Rules applicable to all Schedules of the Income Tax Act, 1918, provides in sub-s. 1 as follows: "Upon payment of any interest of money, annuity, or other annual payment charged with tax under Schedule D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment." Then further sub-sections of the Rule go on to provide that he shall then be assessed on the sums which he has deducted or ought to have deducted.

It will be observed that the Rule is confined expressly to royalties or other sums paid "in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge"; and by s. 25 of the Finance Act, 1927, it was provided: "Where the usual place of abode of the owner of a copyright is not within the United Kingdom"—which is this case—"Rule 21 of the General Rules"—that is the Rule I have read—"shall apply to any payment of or on account of any royalties or sums paid periodically for or in respect of that copyright as it applies to annual payments not payable out of profits or gains brought into charge." So that in respect of such a payment, you have not to consider the question of the payment being payable out of profits or gains brought into charge; there is an absolute obligation upon "the person by or through whom any such payment is made" to deduct the sum representing income tax from that sum.

Now were the appellants in this case, Messrs. Rye & Eyre, "the person by or through whom any such payment is made"? I imagine that, on the plain meaning of those words, the words would be apt to describe either the principal or the agent—the principal by whom, or the agent through whom, the payment was made. I reserve any question as to whether or not in this particular case the solicitors could be said to be the persons "by whom" the payment was made,

but it seems to me obvious that the payment was made either by them or through them. And indeed the only other suggestion that was made in the case was that they were not the persons "through whom" the payment was made, because "through whom" means the person in consequence of whose instructions the payment was made, which seems to me to be entirely contrary to the plain meaning of the words, which appear to me to indicate agency.

My Lords, it appeared to the learned judges below to be a very plain case, and, indeed, it so presents itself to my mind. I move your Lordships that this appeal be dismissed.

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—

LORD TOMLIN. My Lords, I agree, and have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I agree.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT. My Lords, I agree.

*Order appealed from affirmed, and appeal dismissed
with costs.*

Lords' Journals, March 1, 1935.

Solicitors for appellants: *Rye & Eyre.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H L. (E.)* DE TRAFFORD AND ANOTHER APPELLANTS ;
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 THE ATTORNEY-GENERAL ON BEHALF OF }
 HIS MAJESTY } RESPONDENT.

Considered. In re
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 [1952] 1 Ch. 752

Revenue—Estate Duty—Property passing on death—Property deemed to pass—Settled Estate—Tenant for life—Interest ceasing on death—Interest limited to cease on death—Surrender of Interest—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1; s. 2, sub-s. 1—Finance Act, 1900 (63 Vict. c. 7), s. 11—Finance (1909–10) Act, 1910 (10 Edw. 7), c. 8.

At the date of the order of the Chancery Division hereinafter mentioned an estate of great value consisting of real property, invested funds, and policies of insurance was by a deed of resettlement and two private Acts of Parliament vested in trustees for the life of Sir H. F. de T., the late baronet, to uses for raising 250,000*l.* for portions for the late baronet's younger children and subject thereto to the use of Sir H. E. de T., the present baronet, for life with remainder to his first and other sons in tail male; and it was provided that the annual income of the estate should during the life of the late baronet be held and applied by the trustees in making certain payments and among them a payment of an annual sum of 8000*l.* to the present baronet during the joint lives of the late baronet and the present baronet; furthermore, the present baronet was authorized to charge the estate with sums amounting to 50,000*l.*, not to be raised or paid during the life of the late baronet.

The late baronet exercised to its full extent his power of appointing portions for his younger children by various deeds poll charging the estate with various sums to be raised and paid after his death. The present baronet borrowed from the trustees sums amounting to 50,000*l.* and, in pursuance of the authority above mentioned, charged the estate with payment thereof after the death of the late baronet.

By an order of the Chancery Division dated July 28, 1928, and referred to above, the trustees were empowered to raise and pay in the lifetime of the late baronet the two sums of 250,000*l.* and 50,000*l.* At some time after August 15, 1928, the 250,000*l.* was accordingly raised and paid as portions to the younger children of the late baronet, and the 50,000*l.* was treated as repaid to the trustees. On January 10, 1929, the late baronet died.

* *Present*: LORD ATKIN, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

On an information by the Attorney-General claiming estate duty at the appropriate rate under s. 1 of the Finance Act, 1894, in respect of the principal value of the estate as property passing on the death of the late baronet, including the sums of 250,000*l.* and 50,000*l.* as property deemed to have passed thereon under s. 11 of the Finance Act, 1900, as amended by s. 59, sub-s. 1, of the Finance (1909-10) Act, 1910, the trustees contended that they were entitled to deduct from the estate alleged to pass: (1.) a principal sum sufficient to produce a yearly sum of 8000*l.*, being the yearly sum payable to the present baronet immediately before the death of the late baronet;

(2.) the two sums of 250,000*l.* and 50,000*l.* mentioned above:—

Held, (1.) that the property passing on the death of the late baronet included the principal sum sufficient to produce the yearly 8000*l.*, inasmuch as the yearly sum ceased to be payable on the death of the late baronet.

Earl Cowley v. Inland Revenue Commissioners [1899] A. C. 198 followed.

(2.) That the sums of 250,000*l.* and 50,000*l.* fell within the words of s. 11 of the Act of 1900 as amended by s. 59, sub-s. 1, of the Act of 1910, being sums in which the trustees had an interest limited to cease on the death of the late baronet; which had been surrendered within three years before the death for the benefit of persons entitled to an interest in reversion, and which therefore were deemed to pass on the death of the late baronet.

Order of the Court of Appeal affirmed.

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APPEAL from part of an order of the Court of Appeal dated July 24, 1933, affirming an order made by Finlay J. on January 23, 1933, in a cause in which the Attorney-General on behalf of His Majesty was the informant and the trustees of the instruments and private Acts of Parliament herein-after mentioned were defendants. The question raised was whether the trustees were liable for estate duty on the death of Sir Humphrey Francis de Trafford deceased, hereinafter called "the late baronet" (who died on January 10, 1929), in respect of freehold and leasehold property in the counties of Lancaster, Chester, Norfolk, Hertford and elsewhere, and investments of capital moneys and policies of insurance, hereinafter collectively called "the de Trafford Estates." The trustees accepted liability for any estate duty held to be payable in respect of the de Trafford Estates.

The following summary of the facts is mainly extracted from the judgment of Lord Russell of Killowen.

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Under and by virtue of the will dated May 5, 1883, of Sir Humphrey de Trafford, the father of the late baronet and hereinafter referred to as the testator, and under and by virtue of a resettlement dated July 30, 1886, executed in order to comply with a condition contained in the said will, the de Trafford Estates stood limited to uses to the effect that the late baronet was (subject to a jointure) tenant for life in possession of the Estates with remainder to his first and other sons in tail male with divers remainders over. The will contained a power for any person being tenant for life in possession of the Estates by deed or will to charge the said estates with portions for his younger children as therein provided. The testator died on May 4, 1886, and his will was proved on July 28, 1886.

On the death of the testator the late baronet entered into possession of the de Trafford Estates and remained in possession thereof until the passing of the de Trafford Estate Act, 1904. He borrowed large sums on the security of his life estate and of certain policies of assurance payable on his death.

In these circumstances the de Trafford Estate Act, 1904 (4 Ed. 7, c. 3), was passed, which by s. 6 enabled the trustees of the testator's will to purchase the life estate of the late baronet. In 1907 the late baronet, in pursuance of his power under the testator's will of charging portions for his younger children, charged the de Trafford Estates with a capital sum of 90,000*l.* not to be raised or paid during his lifetime.

Sir Humphrey Edmund de Trafford, the present baronet and eldest son of the late baronet, attained the age of twenty-one years on November 29, 1912. The de Trafford Estates were resettled on May 8, 1914. The present baronet assured the de Trafford Estates to the appellants in fee simple to uses for raising, for further portions for the younger children of the late baronet, in addition to the aforesaid sum of 90,000*l.* the sum of 160,000*l.*, and subject thereto to the use of the present baronet for life with remainder to his first and other sons in tail male with remainders over in strict settlement. By clause 8 of the resettlement it was provided that the rents

and profits and annual income of the de Trafford Estates should be held upon trust during the joint lives of the late baronet and the present baronet to make thereout a payment of 8000*l.* a year to the present baronet as from his attaining the age of thirty-five years until he should attain the age of forty years. He attained the age of thirty-five years on November 29, 1926.

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By clause 18 of the resettlement the present baronet was authorized to charge the estates with capital sums to the amount of 50,000*l.* after the death of the late baronet.

On July 31, 1914, the de Trafford Estate Act, 1914 (4 & 5 Geo. 5, c. 1), was passed. By s. 3 thereof the resettlement of 1914 and all the limitations, trusts, powers and provisions thereof were ratified, approved, and declared to be valid and effectual, and in particular the trusts and provisions of clause 8 were validated as from February 15, 1913.

The late baronet exercised his power of appointing portions to the full extent of 160,000*l.* to be raised and paid after his death, making the total amount charged for that purpose and payable after his death a capital sum of 250,000*l.* The present baronet at different times in the years 1917 and 1918 borrowed from the trustees sums amounting to 50,000*l.*, and charged portions of the de Trafford Estates with payment of the sums borrowed.

The question in this appeal related to the above mentioned sum of 8000*l.*, and the two sums of 250,000*l.* and 50,000*l.* (together 300,000*l.*) mentioned in the last paragraph hereof.

It was considered to be in the interest of all parties concerned, some of whom were infants, that the portions for younger children should be presently raised, before the death of the late baronet, and paid to them or for their benefit. Accordingly in pursuance of a scheme, approved by an order of the Chancery Division on August 15, 1928, the trustees of the Estate by a deed dated August 15, 1928, surrendered funds in their hands to the necessary amount, and 250,000*l.* was raised and paid, and the 50,000*l.* borrowed from the trustees was treated as repaid to them.

The late baronet died on January 10, 1929.

H. L. (E.) On November 27, 1931, the Attorney-General filed an information praying that it might be declared :—

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(I.) That upon the death of the late baronet estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894 (1), in respect of the principal value of the de Trafford Estates without any deduction in respect

(1) Finance Act, 1894, s. 1: " In the case of every person dying after the commencement of this Part of this Act, there shall, save as herein-after expressly provided, be levied and paid, upon the principal value ascertained as herein-after provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called ' Estate duty,' at the graduated rates herein-after mentioned,"

...

Sect. 2, sub-s. 1: " Property passing on the death of the deceased shall be deemed to include the property following, that is to say :—

(a) Property of which the deceased was at the time of his death competent to dispose ;

(b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest:"

...

Finance Act, 1900, s. 11, sub-s. 1: " In the case of every person dying after the thirty-first day of March nineteen hundred, property whether real or personal in which the deceased person or any other person had an estate or interest limited to cease on the death of the deceased shall, for the purpose of the Finance Act, 1894, and the Acts amending that Act, be deemed to pass on the death of the deceased, notwithstanding that that estate or interest

has been surrendered, assured, divested, or otherwise disposed of, whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder or reversion in such property, unless that surrender, assurance, divesting, or disposition was bona fide made or effected twelve months before the death of the deceased, and bona fide possession and enjoyment of the property was assumed thereunder immediately upon the surrender, assurance, divesting, or disposition, and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, and of any benefit to him by contract or otherwise "

Finance (1909-10) Act, 1910, s. 59, sub-s. 1: " In the case of a person dying on or after the thirtieth day of April nineteen hundred and nine, the period preceding the death of the deceased before which a disposition purporting to operate as an immediate gift inter vivos must have been made, or a surrender, assurance, divesting, or disposition must have been made or effected, in order that the property taken under the disposition, or affected by the surrender, assurance, divesting, or disposition, may not be included as property passing on the death of the deceased, shall be three years instead of twelve months before the death, and accordingly," etc.

of the yearly sum of 8000*l.* as property passing on the death of the late baronet. H. L. (E.)

(2.) That upon the death of the late baronet estate duty at the appropriate rate became payable under s. 11 of the Finance Act, 1900, as amended by s. 59, sub-s. 1, of the Finance (1909-10) Act, 1910, in respect of each of the sums of 90,000*l.*, 160,000*l.* and 50,000*l.*, as property deemed to pass on the said death.

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On the hearing of the information Finlay J. gave judgment for the Crown. On an appeal by the trustees Lord Hanworth M.R. and Lawrence and Slesser L.JJ. affirmed the judgment of Finlay J.

The trustees appealed to this House.

1935. Feb. 19. *H. S. Preston K.C., A. M. Latter K.C. and L. W. Byrne* for the appellants.

The arguments of counsel sufficiently appear from the judgment of Lord Russell of Killowen.

Sir Thomas Inskip A.-G. and *J. H. Stamp* were present on behalf of the Crown, but were not called upon.

The House took time for consideration.

MARCH 7. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion about to be pronounced by my noble and learned friend Lord Russell of Killowen, and I entirely agree with it in every respect.

LORD TOMLIN. My Lords, I also have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Russell of Killowen. I agree with his conclusions and with the reasoning upon which they are based.

LORD RUSSELL OF KILLOWEN. My Lords, for the purpose of indicating my view as to the order which should be made on this appeal, it will not be necessary to trace in minute detail the numerous documents which have been executed,

H. L. (E.) the private Acts of Parliament which have been passed,
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 DE
 TRAFFORD (the grandfather of the present baronet) died on May 4, 1886.

Under and by virtue of his will and a resettlement dated
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 July 30, 1886, the de Trafford Estates stood limited to uses
 under which (immediately before the passing of the de Trafford
 Estate Act, 1904, on August 15 of that year) Sir Humphrey
 Francis de Trafford (the late baronet) was legal tenant for
 life in possession with remainder to his first and other sons
 in tail male. He had power to charge the estates with por-
 tions for his younger children to an amount in the events
 which happened of 90,000*l.* I disregard a jointure in favour
 of the late baronet's mother, who died on July 1, 1922.

Owing to circumstances which need not be discussed the de
 Trafford Estate Act, 1904, was passed. By s. 6 the trustees
 under the Act (who were the trustees of the testator's will)
 were authorized to purchase the life interest of the late baronet
 which was thereby vested in the trustees. By s. 22 the annual
 income arising during his life was to be applied in the order
 and manner and for the purposes therein specified, which
 included a discretionary application of a maximum annual
 sum for the maintenance and support of the late baronet,
 his wife and issue. In 1907 the late baronet exercised his
 power of charging portions and charged the de Trafford Estates
 with a capital sum of 90,000*l.* for that purpose, but not to
 be raised or paid during his lifetime.

Sir Humphrey Edmund de Trafford (the late baronet's
 eldest son and the present baronet) attained his age of twenty-
 one years on November 29, 1912; and shortly afterwards
 he disentailed and resettled the estates. The resettlement is
 dated May 8, 1914, and by it the present baronet assured the
 de Trafford Estates to the trustees in fee simple to uses for
 raising further portions for the late baronet's younger children
 to the amount of 160,000*l.* in addition to the 90,000*l.* already
 charged, and subject thereto to the use of the present baronet
 for life with remainder to his first and other sons in tail male.
 By clause 8 of the resettlement it was provided that notwith-

standing anything in the Act of 1904 contained the annual income of the de Trafford Estates should during the life of the late baronet be held and applied by the trustees in making the payments therein mentioned, which included the payment (during the joint lives of the late baronet and the present baronet) of an annual sum to the present baronet amounting to 8000*l.* as from his attaining the age of thirty-five years until he should attain the age of forty years. By clause 18 of the resettlement he was authorized by deed to charge the estates with the payment to himself of capital sums not exceeding 50,000*l.* with a proviso that no sum appointed under that power should be payable or raisable during the life of the late baronet. By s. 3 of the de Trafford Estate Act, 1914, this resettlement was ratified and all the limitations trusts, powers and provisions thereof were declared valid and effectual.

The late baronet exercised his power of appointing portions to the full amount of the additional sum of 160,000*l.*, to be raised and paid after his death, with the result that the total amount charged for that purpose upon the estates and raisable after his death was a capital sum of 250,000*l.*

The present baronet from time to time, between November 5, 1917, and March 5, 1918, borrowed moneys from the trustees amounting in all to 50,000*l.*, and on each occasion as part of the security for repayment thereof he, in exercise of the power conferred by the resettlement of 1914 and the Act of 1914, charged a part of the Estates with payment to the trustees of a sum equal to the loan, and appointed a term of years commencing from the death of the late baronet for securing the sum so charged.

Although the said sums of 50,000*l.* and 250,000*l.* were not raisable or payable out of the estates until after the death of the late baronet, circumstances arose which rendered it advisable in the interests of all concerned that these sums should be raised and paid out of the estates in advance, and a scheme for that purpose was prepared and approved by an order of the Chancery Division, dated July 28, 1928, which gave liberty to the trustees to carry the scheme into effect. The scheme provided (amongst other things) for such surrender

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H. L. (E.) or release of the late baronet's life interest as was subsequently executed.

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In pursuance of that order and scheme the trustees by a deed of surrender dated August 15, 1928, surrendered and released investments and cash, or investments only, of the amount or value of 300,000*l.* to be raised forthwith by the trustees (by appropriation or otherwise) out of capital money or investments representing capital money, to the intent that the said portions amounting to 250,000*l.* and the said sum of 50,000*l.* might be brought into immediate possession discharged from all trusts affecting the same during the life of the late baronet.

The 250,000*l.* portions for younger children were accordingly raised and paid, by appropriation or otherwise, and the sum of 50,000*l.* raisable under the resettlement of 1914 and the Act of 1914 was provided by the appropriation thereto of the 50,000*l.* owing by the present baronet to the estate in respect of the moneys to that amount already borrowed by him from the trustees. Not long afterwards the late baronet died—namely, on January 10, 1929.

It is in regard to the estate duty payable in consequence of his death, that two disputed points have come before your Lordships' House for determination.

The first one is concerned with the annual sum of 8000*l.* of which the present baronet was in receipt and had been in receipt since he had attained the age of thirty-five years on November 29, 1925. That annual sum, since it was only payable out of the annual income arising during his father's life, came to an end with his father's death; but on the happening of that event he became tenant for life in possession of the estates, and as such entitled, during his life, to the whole income arising therefrom subsequently to his father's death. In these circumstances it is argued by the appellants (who are the trustees and have accepted liability for the duty payable) that a notional portion of the estates (namely, so much as was required to produce 8000*l.* per annum) neither passed on the death of the late baronet within the meaning of s. 1 of the Finance Act, 1894, nor should be deemed to be

included in property so passing by reason of s. 2 of that Act. Alternatively it is contended that no benefit accrued or arose to the present baronet by reason of the cesser of his right to receive the 8000*l.* a year.

My Lords, these are contentions which in my opinion we are precluded by authority from adopting. I am unable to distinguish this case from *Earl Cowley v. Inland Revenue Commissioners*. (1) In that case two points arose for decision. The first related to a sum secured by a mortgage, which had been created on the fee simple of the Mornington estates before the execution of a settlement of those estates upon trust that the third Earl Cowley should receive during the life of his father the second Earl a sum of 3000*l.* a year, and, subject to and charged as aforesaid, for the second Earl for life and after his death for the third Earl for life with remainders over. The second point arose in regard to the annual sum of 3000*l.* On the death of the second Earl the Crown sought to recover estate duty on the footing of the estates being valued as unincumbered by the mortgage. It was held by your Lordships' House that the case fell under s. 1 of the Finance Act, 1894, and not under s. 2 (b) of that Act; and further that the property which passed on the death of the second Earl was only the property which was settled—namely, the equity of redemption and not the unincumbered fee. The third Earl, however, claimed that no duty should be paid in respect of the annuity of 3000*l.* since no benefit had accrued to him by the cesser of the second Earl's interest, and he claimed to deduct the capitalized value thereof. It was decided that there was no foundation for such a claim. It was urged before us here that the second point in the *Cowley* case (1) had only been argued as a question of deduction from the value of the property which passed; but that the present contention was a question of reduction of the quantum of the property which passed on the death; and it was said that the reasoning which decided the first point in the *Cowley* case (1) was applicable here to establish that the quantum of the property which passed on the death should be reduced

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H. L. (E.) by excluding the notional portion of the estates which I have indicated above. It was further said that the *Cowley* case (1) was distinguishable on the facts.

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—
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—

For myself I see no distinction of substance on the facts ; for the fact that the life estate had been divested from the tenant for life and vested in trustees during his life, can of itself cause no different answer to be given to the question what property passed on his death. The mortgage in the *Cowley* case (1) was outside and anterior to the settlement, and independent of it. The annual sum of 8000*l.* in the present case was payable out of income arising under the settlement. The reasoning which decided the first point in the *Cowley* case (1) cannot therefore apply. Nor can I see any justification for the exclusion of any portion of the estates from the property passing on the death. The present baronet's right to an annual sum of 8000*l.* gave him no right to the receipt of any particular items of the annual income, or to the income of any particular portion of the estates. His right to receive an annual sum of 8000*l.* ceased on the death of the late baronet ; his right, which then arose, to receive all the rents was a new and a different right. There was never either in fact or in law anything resembling a surrender of the life estate to the immediate remainderman, as was the case in *Attorney-General v. Beech*. (2). In my opinion it is impossible to distinguish this case from the *Cowley* case. (1) The property as a whole passed to the present baronet freed from the trust or liability to pay the annual sum, which trust or liability automatically came to an end with the death of his father. The case falls within Lord Watson's words (3) : " The annuity . . . was regularly paid to the appellant during his father's lifetime, and ceased to be payable on his death. No part of it formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of resettlement, not in fee but in life-rent. In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant

(1) [1899] A. C. 198.

(2) [1899] A. C. 53.

(3) [1899] A. C. 208.

upon his father's death has been thereby diminished or affected."

The second point in dispute concerned the capital sums amounting to 300,000*l.* which were paid off in advance some five or six months before the late baronet's death. They formed no part of the estates at the death; they had before the death been permanently taken out of the estates and paid away elsewhere. Nevertheless the Crown claims that the portions of the estates released to provide those sums must be deemed to have passed on the late baronet's death by virtue of s. 11 of the Finance Act, 1900. The appellants resist this claim on the ground that the facts of this case do not fit in with the provisions of that section. The section runs thus: [his Lordship read s. 11, sub-s. 1, of the Act, which is set out in the footnote on p. 284 ante, and proceeded:] By a later statute (1) the section was amended by substituting the period of three years for the period of twelve months.

My Lords, it seems to me that the section in terms covers this case. So far as concerns the portions of the estates which were released to provide the portions and the 50,000*l.* during the lifetime of the late baronet, they were property in which the trustees had an interest limited to cease on the death of the late baronet, and that interest was surrendered, assured, divested or otherwise disposed of to or for the benefit of the younger children and the present baronet, each of whom was a person entitled to an interest in reversion in such property, the interest being one which (but for the disposition for his or her benefit) would only have become an interest in possession after the late baronet's death. That property must accordingly be deemed to pass on his death, inasmuch as the disposition was not made or effected three years before his death.

In the result I am of opinion that the decision of the Court of Appeal was correct and that this appeal should be dismissed with costs.

LORD MACMILLAN. My Lords, I agree.

(1) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 59, sub-s. 1,

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H. L. (E.) LORD WRIGHT. My Lords, I also agree.

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*Order appealed from affirmed and appeal dismissed
with costs.*

Lords' Journals, March 7, 1935.

Solicitors for appellants: *Whitfield, Byrne & Dean, for
Taylor, Kirkman & Mainprice, Manchester.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)*	THE LORD MAYOR, ALDERMEN AND	} APPELLANTS ;
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March 8.	BIRMINGHAM	

AND

BARNES (INSPECTOR OF TAXES) . . . RESPONDENT.

*Revenue—Income Tax—Tramways Undertaking—Profits and gains of
Trade—Depreciation—Wear and tear—Aggregate Deductions—
“ Actual cost ” of Plant—Income Tax Act, 1918 (8 & 9 Geo. 5,
c. 40), Sch. D—Rules applicable to Cases I. and II., r. 6, ss. 1, 6.*

By an agreement made in April, 1920, between the Birmingham Corporation and the Dunlop Rubber Company the Corporation agreed to lay a tramway from the Company's works to a point within the district of the Corporation, and the Company agreed, if certain conditions were performed, to pay, and they did pay, a sum which in the event amounted to 10,806*l.* The Corporation laid the tramway at the cost of 54,752*l.*

In 1922 the Corporation spent 271,399*l.* on renewing its tramways and received from the Unemployed Grants Committee 46,238*l.* in respect of the work done.

By agreement between the Corporation and the Board of Revenue the life of the Corporation's tramways was taken as twelve years ; and for several years, in assessing their tramway undertaking to income tax, deductions of 4562*l.* (one-twelfth of 54,752*l.*) and 22,617*l.* (one-twelfth of 271,399*l.*) were made by the Corporation and allowed by the Revenue officer.

* *Present* : LORD ATKIN, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT,

By Rule 6 applicable to Cases I. and II. of Sch. D, s. 1: "In charging the profits and gains of a trade under this Schedule, such deduction may be allowed as the Commissioners having jurisdiction in the matter may consider just and reasonable, as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the trade and belonging to the person by whom it is carried on."

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By s. 6: "No deduction for wear and tear, or repayment on account of any such deduction, shall be allowed for any year if the deduction, when added to the deductions allowed on that account for any previous years to the person by whom the trade is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or reinstatement."

The Corporation, in making their returns for the purpose of assessment of their tramways to income tax, claimed to make for the years ending on April 5, 1930, and April 5, 1931, the same deduction as before. The Inspector of Taxes contended that "the actual cost" of the tramways to the Corporation was the total sum expended on them by the Corporation after deducting the sums contributed by the Company and the Unemployment Grants Committee, and that the Corporation were only entitled to deduct one-twelfth of the balance after subtracting the sums contributed:—

Held, that "the actual cost" to the Corporation within the meaning of Rule 6, s. 6, above was 54,752*l.* in respect of the new tramway and 271,399*l.* in respect of the renewed tramways, and that in arriving at "the actual cost" the contributions of 10,806*l.* and 46,238*l.* were not to be deducted; and that as the proposed allowances for wear and tear would not with the earlier allowances exceed the actual cost as defined above, the Corporation were entitled to claim them.

Order of the Court of Appeal [1934] 1 K. B. 484 reversed.

APPEAL from an order of the Court of Appeal (1) allowing an appeal from an order of Finlay J. reversing the determination of the Commissioners for the Special Purposes of the Income Tax Acts upon a case stated under s. 149 of the Income Tax Act, 1918, at the request of the Corporation of Birmingham.

The question was whether certain deductions were allowable under Rule 6 applicable to Cases I. and II. of Sch. D of the Income Tax Act, 1918, in assessing the profits of the tramways undertaking of the Corporation to income tax for the years ending on April 5, 1931 and 1932, on account of the diminished value through wear and tear of the tramways.

(1) [1934] 1 K. B. 484.

H. L. (E.) The facts are stated in the opinion of Lord Atkin, and are summarized in the headnote.

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Feb. 22. *A. M. Latter K.C., Wilfrid Greene K.C. and G. R. Blanco White* for the appellants.

Sir Thomas Inskip A.-G. and R. P. Hills for the respondent.

Feb. 25. The House took time for consideration.

March 8. LORD ATKIN. My Lords, the question in this case arises on the construction of a few words in one of the rules relating to the computation of income tax under Sch. D. It has evoked so far an equal division of judicial opinion, and no one therefore would be inclined to express his opinion as not admitting a doubt; but I have come to a conclusion which leads me to invite your Lordships to allow the appeal.

The facts can be shortly stated. In 1920, the Birmingham Corporation laid a new tramway track between Salford Bridge, Erdington, and the works of the Dunlop Rubber Company. They laid the track by direct employment of labour and it cost for labour and materials 54,752*l.* By agreement in writing between the Dunlop Company and the Corporation dated April 19, 1920, the Corporation agreed to construct the tramway; and the Company agreed that if the Corporation had completed the tramway and commenced a reasonable service on or before June 1, 1920, the Company would pay the Corporation 10,000*l.*, and a further sum of 50*l.* a day for each day saved before June 1. 5,000*l.* was paid on March 30, while the work was in progress, the balance, including 806*l.* further dispatch money, was paid after the work was completed. There was no stipulation as to any express use to which the 10,000*l.* was to be put, and so far as I can see the Corporation were free to use it as they pleased. In fact, as was natural, they treated it as a receipt of the tramway undertaking, and their amount of expenditure on permanent way in the year 1920 shows a sum of 43,945*l.* as being the total sum expended, being the actual sum less the payment made by the Dunlop Company.

In 1921 the Corporation embarked on the reconstruction of certain tramway tracks, upon which they expended 271,399*l*. In December, 1920, the Unemployment Grants Committee had intimated that the Government had decided to provide a grant of 3,000,000*l*. to assist local authorities to carry out works at which unemployed men could be engaged. The Corporation applied for a grant in respect of the work on the tramway tracks just mentioned. The work began on February 8, 1921; the application was made on February 10. On February 21, 1921, the Unemployment Grants Committee intimated that they were prepared to make a grant of 30,000*l*. on certain conditions mentioned. From time to time applications for further grants were made and were acceded to. Applications for payment of the promised grant were made on the appropriate forms, the substance of the matter being that the Corporation certified that the stipulated number of unemployed men had been employed and that wages had been paid up to or in excess of the amount of the promised grant. Payments were made by the Committee on these applications in respect of these tramway tracks to the amount of 46,238*l*., thus reducing the amount actually borne by the Corporation to 225,161*l*.

The question that arises on these figures is as to the amount which the Corporation is entitled to claim as an allowance for wear and tear in respect of these tramway tracks under Rule 6 of the rules of Cases I. and II. of the Income Tax Act, 1918. I will not read the rules but will premise that it is common ground that the Corporation were entitled to an allowance for these tracks on the footing that they were new tracks. The allowance is claimed in computing the profits of the Corporation in respect of their tramway undertaking.

In pursuance of Rule 6, s. 1, an allowance has been made to the Corporation year by year in accordance with a scheme adopted by the Board of Revenue in 1922 by agreement with representatives of the various local authorities possessing tramway undertakings. By this scheme allowances were granted "on the basis of the sum actually expended and of the agreed life" with a proviso that the allowances were to

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H. L. (E.) continue until the "full cost" had been allowed. The latter proviso was no doubt intended to give effect to s. 6 of Rule 6. It is not contended that this agreement can alter the true meaning of the rules: but it serves to illustrate the possible use of words the true construction of which has to be sought in the section. The life of the tramways under the agreement was computed at twelve years, and each year the Corporation received an allowance of 4,563*l.* or one-twelfth of 54,732*l.* in the case of the first tramway, and of 22,617*l.*, one-twelfth of 271,399*l.*, in the case of the second tramway. Apparently a question had arisen in 1926 before the Commissioners as to the amount upon which an allowance should be made in the case of another local authority which had also received a grant. The Commissioners then decided that the grant must be based upon the total expenditure, leaving the question as to the limit of the aggregate to be determined when that question arose under s. 6.

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In the present case it arose in the case of the first tramway for the year 1930-31: in the case of the second tramway for the year 1931-32. The Inspector of Taxes claimed that "the actual cost to the Corporation" must be measured by deducting from the total expenditure in the first case the amount paid to the Corporation by the Dunlop Company, in the second case the amount of the Government grant. Added to the previous allowances the full allowances would make up for the years in question an aggregate in excess of the "actual cost" so ascertained.

The question now is whether this meaning of "actual cost to the person" is correct. My Lords, in my opinion the words "the actual cost to the person by whom the trade is carried on" used in this context have no relation to the source from which that person has received the money which he has expended on the plant. One is assisted in the construction by the history of the legislation. In 1876 for the first time statutory authority was given for making an allowance to persons carrying on a trade in respect of diminution in value of their plant by reason of wear and tear. It was a deduction from profits which business men ordinarily make with a view

of making good an essential capital asset which sooner or later will have to be replaced. As it was given, in terms corresponding to Rule 6, ss. 1 and 2, it had obviously nothing to do with the question how or with what funds the business man acquired the plant. In any case he would make a deduction from profits: and the deduction would be based on the value of the plant and its expected life. In the year 1906, however, there arose a case before Walton J. of *John Hall Junior & Co. v. Rickman* (1), in which a shipowner claimed depreciation allowance in respect of a ship which, being used as a hulk, was held to be plant. The allowances had continued so long in respect of this ship that if granted for the tax year in question they would have exceeded 100 per cent. of the cost of the ship to the shipowner. The Inland Revenue Authorities objected, but the judge, though thinking the objection reasonable, could find in the Income Tax Act no restriction on the aggregate of the allowances to be granted. He pointed out, as is conceded, that if the plant were sold the allowances would begin again on the value of the plant to the new owner. After this decision, and undoubtedly in consequence of it, there was passed in 1907 a section in the terms of the present Rule 6, s. 6. I entirely agree with the submission of the Attorney-General that you must not restrict the plain words of a remedial section so as to apply them only to the mischief which occasioned the enactment. But you may look at the mischief as one of the elements assisting you to construe the words of the remedy. You may also look at the use of the same words in relation to the same subjectmatter in the same enactment.

The word "actual" itself gives me no assistance. It serves, as Mr. Latter suggested, to give emphasis to the word following. It is to be the cost, the whole cost, and nothing but the cost. It removes any question of estimate, and in cases where the plant has been purchased for a lump sum together with factory premises it may give rise to a difficult question of fact. The word "actual" is used in the same emphatic sense in Rule 3 in respect of "actual wages, actual expenditure and

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H. L. (E.) actual loss." I do not read "actual cost" to mean anything more than cost accurately ascertained.

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But it is said that the words "to the person" in the phrase "actual cost to the person" plainly indicate that the section is intending to confine the relief to an aggregate equal to the sum of money which the person has defrayed out of his own resources, cost of which the burden has ultimately fallen upon him. My Lords, I confess I do not think that this is the natural meaning of the words. What a man pays for construction or for the purchase of a work seems to me to be the cost to him: and that whether some one has given him the money to construct or purchase for himself; or, before the event, has promised to give him the money after he has paid for the work; or, after the event, has promised or given the money which recoups him what he has spent. In the present case the Corporation paid the whole of the cost of the tramways out of their funds, unless the first half of the Dunlop contribution was so applied, as to which there is no evidence, nor is it material. I myself should not have thought the answer of Birmingham to the question put by Romer L.J. would have been what he suggests. On the hypothesis that the Dunlop Company had recouped the Corporation the whole of the cost of the first tramway I should have thought the answer to "What did it cost you?", or "What did it actually cost you?", would have been "It actually cost us 54,732*l.* but none of the burden of that cost will fall on the Corporation for the Dunlop Company have paid us the full amount." I think the same result is arrived at by saying actual cost to the person is the same thing as the amount expended by the person. One is assisted in this construction by consideration of the words at the end of Rule 6, s. 6, which, as pointed out by Mr. Blanco White, include in that actual cost any expenditure in the nature of capital expenditure. Here there are no qualifying words, and I think the phrase guides one to the conclusion that expenditure on capital improvements by the person, regardless of source, will be the same as actual cost to the person, also regardless of source. No doubt you must give the whole phrase its full meaning. But I find the reference

"to the person" fully satisfied when I remember that, as pointed out by Walton J. in the case that gave rise to the new limitation, the person claiming a reduction may vary from time to time and that with each successive purchaser you are to begin again. The words also serve to make it clear that the cost is the cost to the person carrying on the business, and will include a profit paid by him to a contractor, if one has been employed.

I do not think that it is necessary for the purpose of this case to discuss the question which may arise where the person carrying on the business has acquired the plant by gift, a question that will arise probably, if at all, in respect of a gift under a will. Various problems arise involving amongst others the possible contention that where there has been no cost there is no measure, no yardstick, by which to restrict at all the allowance granted by Rule 6, s. 1. I prefer, therefore, to say nothing on this topic. I find myself in the result in agreement with the Master of the Rolls and Finlay J., and I move your Lordships that this appeal be allowed and the order of Finlay J. restored, and that the appellants have the costs here and in the Court of Appeal.

LORD TOMLIN. My Lords, I agree in all respects with the opinion which has just been delivered, and I have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT. My Lords, I agree.

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Order appealed from reversed: Judgment of Finlay J., thereby set aside, restored: Respondent to pay the appellants the costs incurred by them in the Court of Appeal and also their costs in respect of the appeal to this House: Ordered that the cause be remitted

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back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Lords' Journals, March 8, 1935.

Solicitors for appellants: *Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

Solicitor for respondent: *The Solicitor of Inland Revenue.*

[PRIVY COUNCIL].

J. C.* BARTON AND OTHERS APPELLANTS ;

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Feb. 22.

MOORHOUSE AND OTHERS RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF
NEW ZEALAND.

New Zealand—Will—Settled Land—Sales by trustees under private Act—Proceeds of sales—Vesting of corpus—Postponement of vesting—Construction of private Act.

By the will of a testator who died in 1878 land in New Zealand was devised upon trusts under which the testator's natural daughter became tenant for life with remainders over in tail male to her sons. Her son the first tenant in tail attained the age of twenty-one years, but was killed in action in 1915 during his mother's lifetime. He was survived by an infant son who, upon the death in 1930 of the testator's natural daughter, became tenant in tail in possession. The will contained no power to sell the settled land, but a private Act (the Rhodes Trust Act, 1901) was obtained and gave the trustees power to lease or sell any part of it. By s. 5 of the Act moneys received on any sale were to be invested by the trustees and all income produced by the investments was to be paid to the person "who but for such sale or lease would have been for the time being beneficially

* *Present* : LORD TOMLIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD ALNESS, and SIR LANCELOT SANDERSON.

entitled to the occupation of the land in respect of which such moneys shall have been received." Upon an originating summons issued in 1932 :—

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Held, that the fund representing the proceeds of sales, whether made before or after the death of the infant's father, belonged absolutely to the infant. Under s. 5 of the private Act the income derived from the proceeds of sales, like the rents, was payable to the person entitled under the will as tenant in tail ; but the vesting of the corpus was postponed until there should be a tenant in tail who was entitled to actual possession or receipt of the rents and profits of the settled land.

The private Act, having been passed for the strictly limited purpose of authorizing the trustees to sell or lease the settled land, should not, in the absence of unambiguous language, be given an effect which would unnecessarily alter the rights of the parties.

Judgment of the Court of Appeal of New Zealand [1933] N. Z. L. R. 1348 reversed.

APPEAL (No. 72 of 1934) from a part of a judgment of the Court of Appeal of New Zealand (October 18, 1933), reported at [1933] N. Z. L. R. 1348.

An originating summons issued on August 16, 1932, submitted to the Supreme Court of New Zealand four questions relative to the effect of the will of William Barnard Rhodes, who died in 1878, and of the Rhodes Trust Act, 1901, a private Act by which the trustees were given power to make sales and leases of certain land settled by the will.

The summons was referred to the Court of Appeal, and was heard by the full Court consisting of Myers C.J., Reed, Macgregor, Ostler, Blair, Smith and Kennedy JJ. The questions submitted and the answers returned appear from the judgment in the present appeal, which was from the answers to the last three questions only. Those questions related to the right in the proceeds of land sold under the private Act ; Ostler and Blair JJ. dissented from the answers given by the majority of the Court.

The facts and the grounds of the answers of the majority of the Court appear from the judgment of the Judicial Committee.

1935. Jan. 31 ; Feb. 1, 5. *Wilfrid Greene K.C.*, *Gavin Simonds K.C.* and *Hon. Cyril Asquith* for the appellants.

J. C. *Radcliffe* for the respondents other than Linda Beatrice
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BARTON who was represented by *Bradley Dyne*.
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Feb. 22. The judgment of their Lordships was delivered by

LORD TOMLIN. This is an appeal against part of a judgment and order dated October 18, 1933, of the Court of Appeal of New Zealand.

The questions raised by the appeal are questions of construction upon a private estate Act passed in the year 1901 in connection with the estate settled by the will of the late William Barnard Rhodes, who died in the year 1878.

By the will, certain properties known as Heaton Park and Highland Park, in the Provincial District of Wellington, in New Zealand, were devised to trustees upon trusts under which, subject to certain rights of occupancy given to his wife during widowhood, in Highland Park, and in the events which happened, his natural daughter, Mary Ann, who married Edward Moorhouse, became tenant for life with remainders over in tail male in favour of her sons, under which William Barnard Rhodes Rhodes-Moorhouse, son of Mary Ann Moorhouse, was first tenant in tail male, and the infant appellant, the son of William Barnard Rhodes Rhodes-Moorhouse, became and is second tenant in tail male.

The will contained divers trusts over in favour of the sons of the testator's daughter in tail general, and the daughters of his daughter in tail male and in tail general, with an ultimate trust providing for the settled lands becoming part of his general residue.

The trusts of residue were for the testator's daughter for life, and after her death for all her children who, being sons, should attain the age of twenty-one years, or being daughters should attain that age or marry as tenants in common.

William Barnard Rhodes Rhodes-Moorhouse, the first tenant in tail male, attained the age of twenty-one years, and was killed in action in France on April 27, 1915, in the lifetime of his mother, Mary Ann Moorhouse. Mary Ann Moorhouse died on April 2, 1930, and upon her death the

infant became tenant in tail male in possession of the settled lands, or such of them as then remained unsold under the statutory power of sale hereinafter mentioned.

Under the will, the testator's wife, in addition to her rights of occupation in respect of Highland Park, was given during her occupancy, and while she continued the testator's widow, and in case of her absence from the mansion house for a period not exceeding two years, an annual sum of 2000*l*.

Now the will contained no power of sale, and in the year 1901 the trustees of the will, who with the infant tenant in tail are the present appellants, promoted a Bill in the New Zealand Parliament by which certain powers of sale and leasing over the settled lands were sought to be conferred on the trustees. That Bill passed into an Act called the Rhodes Trust Act, 1901, and it is with the construction of that Act that this appeal is concerned.

The Act by its preamble recited the death and seisin of the testator of lands in the Provincial District of Wllington, and that since his death other lands in the same district had been acquired by the trustees of the will under the powers of investment contained in the will, and that the widow of the testator was still living, and that Mary Ann Moorhouse was entitled to a life interest in the residuary real and personal estate, and that she had married and had issue; and the preamble also contained a statement of the clauses of the will by which rights of occupancy and the annuity were granted to the wife of the testator, and recitals that the Highland Park Estate was situated near the City of Wellington, and was specially suitable for residential building purposes and that the granting to the trustees of adequate powers of leasing and sale over the said lands would be of great benefit to all the beneficiaries of the will and would enable land which could not then be used for close settlement, though well adapted therefor, to be so used.

By s. 3 of the Act, it was enacted that the trustees might, with the consent of the testator's widow and daughter during their respective lives, and after the deaths of them both, at the discretion of the trustees, exercise over all or any part

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or parts of the lands in the Provincial District of Wellington vested in the trustees, such powers of sale and leasing under the Leasing and Sales of Settled Estates Act, 1865, as they could have been authorized by the Supreme Court to exercise under the said Act and its amendments if the consents of all beneficiaries had been obtained and no prohibition against sale or leasing had been contained or implied in the said will ; and also such powers under s. 14 of the said Act as they could have been authorized by the Supreme Court to exercise if the consents of all beneficiaries had been obtained and no prohibition against the exercise of such powers had been contained or implied in the said will.

Sect. 4 contained a provision saving the rights of the widow of the testator.

By s. 5 (which is the critical section in this case) there was a provision to the following effect : " All moneys to be received on any sale or sales shall be paid to the trustees to be invested by them in accordance with the trusts of the said will, and all dividends, interest, and income produced by such investments, and all rents derived from any lease or leases of all or any of the said lands shall be paid to the person or persons (if any) who, but for such sale or lease, would have been for the time being beneficially entitled to the occupation of the land in respect of which such moneys shall have been received ; and if there shall be no person so entitled, such dividends, income, interests and rents shall be part of the general income of the said estate and dealt with accordingly."

In exercise of the powers conferred by the Act, large parts of the settled estates have been sold. The greater part of the sales took place before April 27, 1915, the date of the death of Captain William Barnard Rhodes Rhodes-Moorhouse.

The questions submitted to the Court were contained in an originating summons issued on August 16, 1932. The first question asked by the summons was whether the estate tail in the unsold lands forming part of the Highland Park Estate was vested in the infant appellant, and the Court in New Zealand has answered that question in the affirmative, and against that decision there is no appeal.

The originating summons, however, raised three other questions: First, Does the Rhodes Trust Act, 1901, create in respect of the purchase moneys and investments representing the same an estate tail vested in the person in whom the estate tail in the unsold lands is for the time being vested? Second, whether the devolution of any of the property comprised in the estate tail had been altered by its having been converted into money and investments under the power of sale conferred by the Rhodes Trust Act of 1901, and if so how it had been altered? and Thirdly, Does the right of the person for the time being entitled as tenant in tail in possession of the said land to bar the rights of his issue and of the persons entitled in remainder on failure of the estate tail in the lands by a disentailing assurance duly executed and filed in the Office of the Supreme Court at Wellington pursuant to s. 114 of "The Property Law Act, 1908," enable him by including in the same or any other deed the purchase moneys arising from the sale of part of the lands and the investments representing the same to bar the rights of those persons therein?

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By a majority the Court gave the following answers to these three questions. To the first question the answer was:

"No. The Rhodes Trust Act, 1901, makes no provision for the disposition of the purchase moneys and the investments representing the same among persons occupying the position of tenants in tail under the will if the land had not been converted, except that the proceeds of the sales are to be invested by the trustees pursuant to the powers of investment conferred by the will and that the purchase moneys and the investments representing the same are to be held upon the trusts of the will subject to the operation of 'The Rhodes Trust Act, 1901.'"

The answer to the second question was as follows:

"The right to the income of the proceeds of the converted land will vest in the person, for the time being, beneficially entitled to the occupation of the land, as if unsold, but the person so entitled to the income is not entitled to acquire the corpus by executing a disentailing assurance."

J. C. The answer to the third question was "No."

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Now the effect of these answers seems to be that the income of the investments representing the sales of lands under the powers of the Act is to be applied as though there were created a series of life interests in such income continuing until the several lines of issue entitled under the entail have come to an end, and that then the fund will go to the persons who are entitled to the general residue, being the persons in whom is the ultimate remainder in the settled lands. It is an essential part of the conclusion at which the Court in New Zealand has arrived that there is no power in the person who for the time being is tenant in tail of the settled lands by means of a disentailing assurance to break the trust in the fund consisting of the investments representing the proceeds of sale of the lands which have been sold. It follows therefore that this is a trust which may continue for hundreds of years, but the validity of which being created by statute cannot be impeached upon the ground of perpetuity.

The views of the majority of the Court, which consisted of seven judges, five of whom took the view which prevailed, were expressed at length by Smith and Kennedy JJ. They were of opinion that the effect of s. 5 of the Act was to create a series of life interests in the persons who were beneficiaries under the entail created by the will, and that inasmuch as an estate tail in personalty is unknown to New Zealand law, and s. 71 of the Fines and Recoveries Act, 1833, which was at all material times in force in New Zealand, did not admit of a disentailing deed of money not subject to be laid out in the purchase of lands, it was not possible for the person who for the time being was the tenant in tail of the settled lands to determine the trust of the money fund.

The language of s. 5 of the Act is somewhat inartificial, but in their Lordships' opinion the meaning of the section is reasonably clear. In the first place it is to be observed that this is a private Act of Parliament passed with a strictly limited purpose, as indicated in the preamble, and accordingly it would be contrary to accepted canons of construction to give to the Act, unless compelled by unambiguous language,

an effect which would alter unnecessarily the rights of the parties if the language employed is capable of any other construction. The meaning which has been put upon s. 5 by the Court of Appeal of New Zealand certainly alters the rights of the parties to an extent which is beyond anything required for conferring on the trustees powers of sale and leasing, and does not seem to their Lordships to be clearly demanded by the language used.

In the next place it is to be noted that the rents of lands leased and the income from proceeds of sale of lands sold are dealt with in s. 5, together and in the same way, and if the language relating to the rents be read apart from the language relating to the income of the proceeds of sale it would read thus : " And all rents derived from any lease or leases of all or any of the said lands shall be paid to the person or persons if any, who but for such lease would have been for the time being beneficially entitled to the occupation of the land in respect of which such money shall have been received."

Read apart from the reference to the income of the investments, those words can, in their Lordships' opinion, only have the effect of carrying the rents to the persons entitled under the trusts of the will to the lands leased in the capacity in which they are so entitled, that is as tenant for life or tenant in tail, as the case may be.

There is therefore in their Lordships' opinion a *prima facie* presumption of an intention that the income from the proceeds of sale, which is dealt with in one clause with the rents, should go as nearly as the law will permit in the same way ; in other words, that the income should be paid to the persons entitled under the will, either as tenant for life or tenant in tail for the time being, in the capacity of tenant for life or tenant in tail, as the case may be. There appears to be nothing to rebut the *prima facie* presumption, and in their Lordships' view the words " who but for such sale would have been for the time being beneficially entitled " are apt to give effect to an intention in the sense indicated. Those words must necessarily imply a reference to the will, and the implied reference to the will fixes the nature of the interest of the recipient.

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J. C. If this be the true effect of the language, the result must
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 BARTON be that the corpus becomes vested in a tenant in tail,
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 MOORHOUSE. following the ordinary rule that where personalty is given
 ——— upon trust to follow as nearly as the rules of law will admit,
 the trusts of realty which is entailed, *prima facie* the first
 tenant in tail takes the fund absolutely.

There is, however, a further question to be considered. Although under the general rule it is the first tenant in tail, whether he comes into possession or not, in whom the personalty vests absolutely, that vesting may be postponed by the employment of suitable directions made with sufficient certainty to justify the conclusion that the vesting is intended to take effect at a later point. In the present case, the words "entitled to occupation of the land in respect of which such money shall have been received" are relied upon by the appellants as indicating that the vesting is intended to be postponed, and that no absolute vesting is to take place, except in the first tenant in tail who is entitled to actual possession or receipt of the rents and profits of the settled land.

Their Lordships are of opinion that this is the true view of the clause. If the words "the occupation of" were omitted, the result would be the same as that contended for on behalf of the respondent, Linda Beatrice Rhodes-Moorhouse, the legal personal representative of Captain William Barnard Rhodes Rhodes-Moorhouse—namely, that the vesting takes place in the first tenant in tail at the time of sale, whether he is in actual possession or not. This is to give no meaning at all to the words "the occupation of." These words are, in their Lordships' judgment, intended to postpone the absolute vesting until there is a tenant in tail in actual possession, and bring the case within the category of those cases of which *In re Angerstein* (1) is an example.

The result is that the fund representing the proceeds of sale of the lands that have been sold under the power, whether during the life of Captain William Barnard Rhodes Rhodes-Moorhouse or after his death, now belongs absolutely to the infant appellant. It will be observed that on the view which

their Lordships take, no question arises as to the existence of an estate tail in personalty, or as to the power to bar such an entail if it existed. The title of the infant appellant is a present absolute interest, which requires nothing further to be done to make it complete.

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Their Lordships think that the appeal should be allowed, that the order of the Court of Appeal of New Zealand should be set aside, and that it should be declared in answer to the questions forming the subject of the appeal that upon the true construction of the Act, and in the events which have happened, the investments representing the proceeds of sale of the settled lands are now vested absolutely in the infant appellant, and their Lordships will humbly advise His Majesty accordingly. The costs of all parties to this appeal as between solicitor and client are to be provided for out of the investments representing the proceeds of sale.

Solicitors for appellants : *Linklaters & Paines.*

Solicitors for respondents : *Coward, Chance & Co.*

[HOUSE OF LORDS.]

MAXWELL APPELLANT ; H. L. (E.)*
AND
THE DIRECTOR OF PUBLIC PROSECUTIONS (ON BEHALF OF HIS MAJESTY) } RESPONDENT.
1934
June 28.

Criminal Law — Manslaughter — Evidence — Admissibility — Cross-examination — Prisoner's previous Character — Previous Charge — Acquittal — Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1, proviso (f).

By proviso (f) to s. 1 of the Criminal Evidence Act, 1898 :
“ A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than

* *Present* : VISCOUNT SANKEY L.C., LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, and LORD WRIGHT.

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that wherewith he is then charged, or is of bad character, unless—

“(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

“(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

“(iii.) he has given evidence against any other person charged with the same offence” :—

Held, that the admissibility of evidence under the proviso is subject to the condition that it is relevant to the issue before the jury or to the credibility of the prisoner as a witness.

A prisoner, charged with manslaughter of a woman by performing upon her an illegal operation, gave evidence of his good character. Thereupon counsel for the prosecution asked him the following questions :—

“Q. This is the second time that sudden death has come to a woman patient of yours, is it not?—A. Yes.

“Q. The first time was in 1927?—A. In 1927, yes. . . .

“Q. And were you tried for manslaughter?—A. Something like that; I could not tell you exactly. Q. And you were acquitted by the jury?—A. Yes.” The prisoner was found guilty of manslaughter.

Held, that these questions were not admissible, inasmuch as the fact that the prisoner had been acquitted on a previous charge of manslaughter was not relevant to the issue before the jury and did not tend to impair the credibility of the prisoner as a witness.

Held, consequently, that the conviction must be quashed.

Order of the Court of Criminal Appeal reversed.

APPEAL from the decision of the Court of Criminal Appeal dismissing the appeal of William Maxwell from a conviction before du Parc J. at York Assizes on February 27, 1934.

The prisoner was charged with the manslaughter of a woman named May Holliday and with feloniously using upon her a certain instrument, to wit an enema, with intent to procure a miscarriage contrary to s. 58 of the Offences against the Person Act, 1861. He was convicted at York Assizes of the offences as charged and was sentenced to twenty months' imprisonment.

He appealed against the conviction and applied for leave to appeal against the sentence. The appeal and application

were heard by the Court of Criminal Appeal on April 23, 1934. The appeal was dismissed, and the application refused.

The prisoner, having obtained from the Attorney-General a certificate that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that it was in his opinion desirable in the public interest that a further appeal should be brought, appealed to this House.

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1934. May 31. *Paley Scott K.C.* and *W. A. Macfarlane* for the appellant.

Jardine K.C. and *J. Alan Bell* for the respondent.

The facts are stated in the speech of the Lord Chancellor, which also indicates the arguments of counsel.

The following authorities were referred to: *Rex v. Barron* (1); *Rex v. Sullivan* (2); Archbold's Criminal Pleading, 28th ed. (1931), p. 482; 29th ed. (1934), p. 471; *Rex v. Fisher* (3); *Rex v. Ellis*. (4)

June 1. At the conclusion of the argument the order of the Court of Criminal Appeal was reversed, and the cause was remitted back to that Court to do therein as should be just and consistent with the judgment of the House. The Lord Chancellor announced that the opinions of their Lordships would be delivered on a future date.

June 28. VISCOUNT SANKEY L.C. My Lords, the appellant, William Maxwell, was convicted at Leeds Assizes of the manslaughter of a woman called May Holliday, and also of using on her an instrument with intent to procure miscarriage. In effect he was found guilty of causing the woman's death by performing on her an illegal operation. He was sentenced to twenty months' imprisonment with hard labour. He appealed from that conviction to the Court of Criminal Appeal, who dismissed the appeal. From their decision he has now appealed to your Lordships' House under a certificate given by the Attorney-General under the Criminal Appeal Act, 1907, on the ground that there is involved a point of exceptional

(1) (1913) 9 Cr. App. R. 236.

(3) [1910] 1 K. B. 149.

(2) (1913) 9 Cr. App. R. 201.

(4) [1910] 2 K. B. 746.

H. L. (E.) public importance so that in his opinion it was desirable in the public interest that a further appeal should be brought. The question is whether it was permissible in the particular facts of the case, under the Criminal Evidence Act, 1898, s. 1, proviso (f), for the prosecution to ask the prisoner whether on a previous occasion he had been charged with a similar offence, the charge having been tried and having resulted in an acquittal.

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— Sect. 1, proviso (f), of the Act is in these terms :—

“(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

“(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or

“(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or

“(iii.) he has given evidence against any other person charged with the same offence.”

— The particular facts under which the question here arises are as follows. At the trial a detective inspector in the Hull City Police Force gave evidence that on November 17 previously he went to 11 Sandringham Street, the address of the prisoner, and met him in the passage of his house, and that the prisoner said to him : “Now, Mr. Huxley, I am unlucky again.” When Mr. Paley Scott proceeded to the cross-examination of this witness, he said to him : “There is one thing in your evidence that I think it is necessary to ask you something about. His words to you began, ‘Now, Mr. Huxley.’” The cross-examination then continued as follows :—

" Q. I take it he knew you therefore ?—A. Yes.

" Q. ' I am unlucky again.' Is it a fact within your knowledge that a patient of his whom he was treating some seven years ago died during the treatment ?—A. Yes.

" Q. Not at his house, I think ?—A. No.

" Q. But at a time when the patient was undergoing treatment by him ?—A. *En route* to his house from her home address.

" Q. So far as you know, would that be what he was referring to when he said, ' I am unlucky again ' ?—A. I should imagine so.

" *Jardine* : My Lord, I venture to submit that as my learned friend has asked about a patient who died some years ago and has left it at that, I am entitled to ask a further question on that topic.

" DU PARCQ J. : Is there any doubt about that, Mr. Paley Scott ? The jury are entitled to know the whole story.

" *Paley Scott* : I can only say at the moment that I do not know what the question is going to be. I know what the facts are.

" *Jardine* : What are the facts which followed the death ?

" DU PARCQ J. : I do not know about the facts which followed the death ; I do not know anything about it.

" *Jardine* : The question that I propose to ask is : What happened to William Maxwell consequent upon the death of his patient ?

" DU PARCQ J. : I do not think I could allow that question in that form.

" *Jardine* : If your Lordship pleases.

" *Paley Scott* : Now that that has been asked there may be a misunderstanding. The jury may think that he was convicted of some offence as a result of that. As long as it is quite understood that that did not happen, I have no objection. That question would suggest to the minds of the jury that he had been convicted.

" DU PARCQ J. : You found that a patient of his died during some treatment that she was receiving from him ?—

A. Consequent upon treatment, my Lord."

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Subsequently the prisoner went into the box himself. He was asked by his learned counsel: "Have you ever been convicted of any offence in your life?" and he replied: "No, I have lived a good, clean, moral life, sir."

Thereupon, when the counsel for the Crown proceeded to cross-examine the witness, he asked him the following questions:—

"Q. This is the second time that sudden death has come to a woman patient of yours, is it not?—A. Yes.

"Q. The first time was in 1927?—A. In 1927, yes.

"Q. And you were tried for murder, were you not?—A. No.

"Q. Were you committed to trial for murder?—A. No.

"Q. And were you tried for manslaughter?—A. Something like that: I could not tell you exactly.

"Q. And you were acquitted by the jury?—A. Yes.

"Q. That woman was put by an adopted daughter of yours into a taxi and died before she got home?—A. No.

"Q. Where did she die?—A. At home.

"Q. How long after leaving your house?—A. I could not tell you, because I had nothing whatever to do with it. She got nothing from me and I had stopped the case a week before. They had only been twice or thrice at my place.

"Q. The matter was inquired into at the Assizes at Leeds and you were acquitted by a jury?—A. Yes, and I have given the information to the detectives and police of Hull, and people came and told me the whole story of that girl and what the mother had done. The next day after her death young doctors from the Infirmary gave evidence that the uterus was in a very advanced state of decomposition, a thing we have never seen before. I never used anything and never had. That was nothing to do with me whatever. She had never got into my room; she was here at the door."

The learned judge in summing-up referred to the incident of the prisoner's acquittal on the previous charge in the following words: "Then there is one other matter which I must deal with. It came out in the course of the case that the prisoner had talked about another unfortunate business,

or words to that effect ; I am not giving the exact words. He had said something like, ' I'm unlucky again,' and naturally enough Mr. Paley Scott, representing him, wanted it to be clear to you that that did not mean that he had ever previously been convicted of any offence. Naturally enough also, Mr. Jardine, appearing for the prosecution, thought that you ought to know a little more about what happened, and it turns out that a patient of his died in circumstances which apparently gave rise to suspicion as a result of which he was put on his trial for murder and acquitted. Now my advice to you is, and I am sure you will act upon it ; put that out of your minds altogether. You and I know very little about it ; I know no more than you do, and that is not much. All we know about it is that he was suspected, and suspicion in these Courts I hope counts for nothing ; it counts for nothing with me and I am sure it will count for nothing with you. He was tried and he was acquitted and that means that he can say that he was not proved guilty, and if he was not proved guilty he ought to be assumed innocent on that charge. Therefore, you are left at the end of all that evidence very much where you were before, and I am sure you will be wise enough to say to yourselves : ' We will deal with this case and the evidence in this case and nothing else.' "

In the Court of Criminal Appeal the argument proceeded mainly upon the construction of the section above referred to and to its bearing on the facts which came out at the trial, and in dismissing the appeal the learned Lord Chief Justice said :—

" Now, here it is manifest that the appellant had personally and by his advocate asked questions with a view to establishing his good character and had given evidence of his good character and, therefore, the only question which we have to consider is whether that which was done here on the part of the prosecution was permitted under the words of the para. (f). It is obvious that that paragraph distinguishes three things : (1.) has committed, (2) has been convicted of, and (3.) has been charged with, any offence other than that wherewith he

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— On the appeal to your Lordships' House, your Lordships came to the conclusion, after hearing the argument on both sides, that the appeal should be allowed, and made an order accordingly, but announced that at a later date the reasons for that course would be given. This I now proceed to do.

It must first of all be stated that it has been admitted throughout that the prisoner in saying that he had lived a good, clean, moral life, had put his character in issue, and had in the words of the proviso (f) (ii) "given evidence of his good character." The first question here is, What consequences follow from that?

— This involves the proper construction of s. 1 (f) of that Act. We start with the hypothesis that the prisoner had given evidence of his good character. It will be remembered that it was not until the year 1854 that the parties to a civil case were entitled to give evidence on their own behalf. But a prisoner could not give evidence on his own behalf at his trial until the coming into operation of the Criminal Evidence

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Act, 1898, except in a few cases, of which the most important are those specified in certain sections of the Offences against the Person Act, 1861, the Law of Evidence Act, 1877, and the Criminal Law Amendment Act, 1885. When Parliament by the Act of 1898 effected a change in the general law and made the prisoner in every case a competent witness, it was in an evident difficulty, and it pursued the familiar English system of a compromise. It was clear that if you allowed a prisoner to go into the witness-box, it was impossible to allow him to be treated as an ordinary witness. Had that been permitted, a prisoner who went into the box to give evidence on oath could have been asked about any previous conviction, with the result that an old offender would seldom, if ever, have been acquitted.) This would have offended against one of the most deeply rooted and jealously guarded principles of our criminal law, which, as stated in *Makin v. Attorney-General for New South Wales* (1), is that "it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried." Some middle way, therefore, had to be discovered, and the result was that a certain amount of protection was accorded to a prisoner who gave evidence on his own behalf. (As it has been expressed, he was presented with a shield and, it was provided that he was not to be asked and that, if he was asked, he should not be required to answer, any question tending to show that he had committed or been convicted of or been charged with any offence other than that where-with he was then charged, or was a bad character. Apart, however, from this protection, he was placed in the position of an ordinary witness in an ordinary civil case. The laws of evidence were not otherwise altered by the Criminal Evidence Act, 1898, and the prisoner who was a witness in his own case could not be asked questions which were irrelevant or

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(1) [1894] A. C. 57, 65.

H. L. (E.) had nothing to do with the issue which the Court was endeavouring to decide. As has already been pointed out, the prisoner in the present case threw away his shield and, therefore, the learned counsel for the prosecution was entitled to ask him, and he could be required to answer, any question tending to show that he had committed or been convicted of or been charged with an offence, but subject to the consideration that the question asked him must be one which was relevant and admissible in the case of an ordinary witness. The Act does not in terms say that in any case a prisoner may be asked or required to answer questions falling within proviso (f), or impose any such affirmative or absolute burden upon him. I think this conclusion is confirmed by a study of the words of the statute. In s. 1, proviso (e), it has been enacted that a witness may be cross-examined in respect of the offence charged, and cannot refuse to answer questions directly relevant to the offence on the ground that they tend to incriminate him: thus if he denies the offence, he may be cross-examined to refute the denial. These are matters, directly relevant to the charge on which he is being tried. (Proviso (f), however, is dealing with matters outside, and not directly relevant to, the particular offence charged; such matters, to be admissible at all, must in general fall under two main classes: one is the class of evidence which goes to show not that the prisoner did the acts charged, but that, if he did these acts, he did them as part of a system or intentionally, so as to refute a defence that if he did them he did them innocently or inadvertently, as for instance in *Makin v. Attorney-General for New South Wales* (1), where the charge was one of murder; another illustration of such cases is *Rex v. Bond*. (2) This rule applies to cases where guilty knowledge or design or intention is of the essence of the offence.

The other main class is where it is sought to show that the prisoner is not a person to be believed on his oath, which is generally attempted by what is called cross-examination to credit. Closely allied with this latter type

(1) [1894] A. C. 57.

(2) [1906] 2 K. B. 389.

of question is the rule that, if the prisoner by himself or his witnesses seeks to give evidence of his own good character, for the purpose of showing that it is unlikely that he committed the offence charged, he raises by way of defence an issue as to his good character, so that he may fairly be cross-examined on that issue, just as any witness called by him to prove his good character may be cross-examined to show the contrary. All these matters are dealt with in proviso (f). (The substantive part of that proviso is negative in form and as such is universal and is absolute unless the exceptions come into play.) Then come the three exceptions: but it does not follow that when the absolute prohibition is superseded by a permission, that the permission is as absolute as the prohibition. When it is sought to justify a question it must not only be brought within the terms of the permission, but also must be capable of justification according to the general rules of evidence and in particular must satisfy the test of relevance. Exception (i.) deals with the former of the two main classes of evidence referred to above, that is, evidence falling within the rule that where issues of intention or design are involved in the charge or defence, the prisoner may be asked questions relevant to these matters, even though he has himself raised no question of his good character. Exceptions (ii.) and (iii.) come into play where the prisoner by himself or his witnesses has put his character in issue, or has attacked the character of others. Dealing with exceptions (i.) and (ii.), it is clear that the test of relevance is wider in (ii.) than in (i.); in the latter, proof that the prisoner has committed or been convicted of some other offence, can only be admitted if it goes to show that he was guilty of the offence charged. In the former (exception ii.), the questions permissible must be relevant to the issue of his own good character and if not so relevant cannot be admissible. But it seems clear that the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune. It seemed to be contended on behalf of the respondent that a charge was per se such evidence that the man charged, even though acquitted, must thereafter remain

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H. L. (E.) under a cloud, however innocent. I find it impossible to accept any such view. The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it neither goes to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because, if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue—namely, whether the prisoner in fact committed the offence on which he is actually standing his trial. It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be strictly confined.

It does not result from this conclusion that the word “charged” in proviso (f) is otiose: it is clearly not so as regards the prohibition; and when the exceptions come into play there may still be cases in which a prisoner may be asked about a charge as a step in cross-examination leading to a question whether he was convicted on the charge, or in order to elicit some evidence as to statements made or evidence given by the prisoner in the course of the trial on a charge which failed, which tend to throw doubt on the evidence which he is actually giving, though cases of this last class must be rare and the cross-examination permissible only with great safeguards.

Again, a man charged with an offence against the person may perhaps be asked whether he had uttered threats against the person attacked because he was angry with him for bringing a charge which turned out to be unfounded. Other probabilities may be imagined. Thus, if a prisoner has been acquitted on the plea of *autrefois* convict such an acquittal might be relevant to his credit, though it would seem that

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what was in truth relevant to his credit was the previous conviction and not the fact that he was erroneously again charged with the same offence; again, it may be, though it is perhaps a remote supposition, that an acquittal of a prisoner charged with rape on the plea of consent may possibly be relevant to a prisoner's credit.

But these instances all involve the crucial test of relevance. And in general no question whether a prisoner has been convicted or charged or acquitted should be asked or, if asked, allowed by the judge, who has a discretion under proviso (f), unless it helps to elucidate the particular issue which the jury is investigating, or goes to credibility, that is, tends to show that he is not to be believed on his oath; indeed the question whether a man has been convicted, charged or acquitted ought not to be admitted, even if it goes to credibility, if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence of which he is charged. I think that it is impossible in the present case to say that the fact that the prisoner had been acquitted on a previous charge of murder or manslaughter, was relevant, or that it tended in the present case to destroy his credibility as a witness.

An instance showing how jealously our law regards the rights of prisoners giving evidence may be found in the recent Criminal Law Amendment Act, 1922. Sect. 2 of that Act provides that, in the case of a man of twenty-three years of age or under, the presence of reasonable cause to believe that the girl in respect of whom the offence is alleged was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under that section. If he is acquitted on that charge and is subsequently charged with another offence under the section and gives evidence on his behalf, he may then be asked whether he has been previously acquitted on a charge under the section. It must not be forgotten that the facts of the present case are very peculiar and exceptional, and it is unnecessary to review or restate the whole law of evidence in criminal matters.

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I now turn to the second point—namely, the contention advanced by counsel for the prosecution that apart from the Criminal Evidence Act, learned counsel for the prisoner by his cross-examination of the inspector had let in the evidence of a previous charge.

I do not think that it is possible to maintain such a contention. The chief argument of the learned counsel for the prosecution was that as his opponent had asked the question he was entitled to get out the whole story. The answer to this is the answer already given, that, as the story had resulted in an acquittal, the circumstances of the case were irrelevant to the issue which the jury was trying. In fact, the acquittal rendered the charge a nullity. The learned counsel for the prosecution was forced to admit that, if his contention was right, it was impossible for a man ever to clear his character by an acquittal because the fact that a *prima facie* charge had been made against him was always a slur upon his character. He even went so far as to say that when a man was charged before a magistrate, even if the prosecutor immediately admitted that he had made a mistake and that the person whom he charged was not the man, the fact that he had been charged with an offence must be a slur upon him. Such a contention is contrary to the whole idea of English jurisprudence.

It was further argued by the prosecution that, even if the evidence was wrongly admitted, the prisoner was not entitled to have the verdict and sentence set aside by reason of the proviso to s. 4 of the Criminal Appeal Act, 1907, which says that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice had actually occurred. Probably upon no other section of the Act have so many cases been decided as upon this one. Their name is legion. The rule which has been established is that, if the conviction is to be quashed on the ground of misreception of evidence, the proviso cannot operate unless the evidence objected to is of such a nature and the circumstances of the case are such

that the Court must be satisfied that the jury must have returned the same verdict even if the evidence had not been given. We think that the appellant has brought himself within this rule. Suppose, for example, that a man had been acquitted three times and the question put to him had been : " Is it a fact that you have been charged three times with this offence, and, secondly, is it a fact that on each occasion you have been acquitted ? " The effect of such a statement on the minds of a jury might be overwhelming, and it is impossible to say in this case that the reception of this evidence was not the deciding factor which made the jury give their verdict. Here was a man of seventy-four years of age. It is impossible to deny that the evidence was strong against him. It is impossible to deny that he had to make very damaging admissions ; but his case was that he had not in fact touched the deceased woman on this occasion, and that the seizure and collapse which immediately preceded her death took place when he in fact was in another room. It might well be that the fact that he had been charged some years before with a similar offence, although the charge led to an acquittal, might have been the last ounce which turned the scale against him.

If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed. Hence the great care which has always been shown by the Court in applying the provisions of s. 4 of the Criminal Appeal Act, 1907, and refusing to quash a conviction. It is often better that one guilty man should escape than that the general rules evolved by the dictates

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H. L. (E.) of justice for the conduct of criminal prosecutions should be disregarded and discredited.

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LORD BLANESBURGH. My Lords, I concur.

LORD ATKIN. My Lords, I concur.

LORD THANKERTON. My Lords, I am of the same opinion.

LORD WRIGHT. My Lords, I also agree.

*Order of the Court of Criminal Appeal reversed :
Cause remitted back to the Court of Criminal
Appeal to do therein as shall be just and
consistent with this judgment.*

Lords' Journals, June 1, 1934.

Solicitors for appellant : *F. Wilberforce Bridge, for William-
son & Stephenson, Hull.*

The Director of Public Prosecutions.

[HOUSE OF LORDS.]

CHARRINGTON AND COMPANY }
 LIMITED } APPELLANTS ;

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Feb. 15.

AND

SIMPSON RESPONDENT.

Landlord and Tenant—Termination of tenancy—Goodwill—Licensed premises—Compensation—Goodwill due to carrying on of business—Energy and capacity of tenant—Extraneous circumstances—Changing condition of neighbourhood—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5, c. 36), s. 4, sub-s. 1 ; s. 5, sub-s. 1.

By s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, the tenant of a holding to which Part I. of the Act applies "shall, if a claim for the purpose is made in the prescribed manner" (and within the prescribed time) "be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto: Provided that (a) the sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title"

"(c) in the case of licensed premises the sum payable as compensation for goodwill under this section shall not include any addition to the value of the premises attributable to the fact that the premises are licensed premises;"

By s. 5, sub-s. 1: "Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him."

* *Present*: LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

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Where a tenant of licensed premises claimed a new lease of the premises under s. 5 of the Act :—

Held, (1.) that proviso (c) to s. 4, sub-s. 1, does not debar a tenant from a right to compensation for goodwill where the sale of intoxicating liquor is the sole trade carried on at the premises ;

Decision of the Court of Appeal sub nom. *Simpson v. Charrington & Co.* [1934] 1 K. B. 64 affirmed ;

(2.) that a tenant is not debarred from a right to compensation by reason of the fact that he has not been more active or energetic than a tenant of ordinary capacity and energy would have been in carrying on the business ;

Decision of the Court of Appeal, *supra*, affirmed :

(3.) But in considering whether a tenant is entitled to compensation for goodwill extraneous circumstances, such as the changing conditions and character of the neighbourhood and inhabitants and of the business, are properly taken into consideration ; for a tenant is not entitled to compensation for goodwill which is attributable solely to those circumstances.

Decision of the Court of Appeal [1934] 1 K. B. 64 to the contrary reversed.

APPEAL from an order of the Court of Appeal (1) reversing a decision of the King's Bench Division (2) (Acton and Goddard JJ.).

The facts and the arguments of counsel are stated in detail in the judgment of Lord Tomlin.

Wilfrid Greene K.C. and *Henry O'Hagan* for the appellants.
Montgomery K.C. and *C. H. Gurney* for the respondent.

The House took time for consideration.

Feb. 15. LORD TOMLIN. My Lords, this appeal raises questions of importance under ss. 4 and 5 of the Landlord and Tenant Act, 1927.

The appellants are brewers and, as landlords, seek to have an order of the Court of Appeal dated October 30, 1933, in favour of their tenant, the respondent, reversed. By that order the Court of Appeal reversed an order of a Divisional Court of the King's Bench Division affirming an order in favour of the appellants made by the deputy county court judge.

The appellants are successors in title of Messrs. Lacon & Co. of Norwich, whom I will call the Brewers.

By an indenture of underlease dated July 13, 1897, the

(1) [1934] 1 K. B. 64.

(2) [1933] 2 K. B. 63.

Brewers let to one Ellis a shop and living premises over it being No. 491 Old Kent Road, known as the Avondale Stores, for a term of thirty-five years, expiring on March 25, 1932, at a rent of 90*l.* per annum. The premises at the date of the letting were, as they still are, licensed for the sale of beer, wines and spirits for consumption off the premises. By the terms of the underlease the tenant was required to carry on the business and was strictly tied to the Brewers, their successors in business and nominees with regard to all malt liquors. About the same time the Brewers became mortgagees by subdemise of the underlease of the premises and subsequently in 1905 as mortgagees went into possession of the premises. Between 1905 and 1910 the premises were occupied by a succession of tenants under the Brewers as mortgagees in possession.

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By an agreement dated April 1, 1910, the Brewers as mortgagees let the premises to the respondent at a rental of 52*l.* per annum for a term of one and a quarter years. At the end of the term the respondent remained as tenant from year to year at the same rent till September 6, 1921.

Owing to the unsatisfactory state of the business in 1910 at the beginning of the respondent's tenancy the Brewers did not require the respondent during the first two years of his tenancy to pay them any rent.

On September 6, 1921, the respondent took an assignment of the unexpired term of the underlease granted to Ellis on July 13, 1897, paying to the Brewers a premium of 300*l.* which with the rent of 90*l.* per annum payable under the underlease was admittedly equivalent to an annual payment of 133*l.* for the unexpired term of the underlease.

On June 19, 1928, the appellants purchased and took from the Brewers an assignment of the reversion expectant on the determination of the underlease.

Both the appellants and the Brewers their predecessors relaxed in favour of the respondent and his predecessors the tie as to malt liquors by permitting him and them to sell bottled beers brewed by other brewers upon terms of paying to the landlords a royalty on such beers.

H. L. (E.) The sole trade carried on at the premises (except a small
 { 1935 grocery business, discontinued long since and immaterial for
CHARRING- the present purpose) has at all material times been the sale
TON & Co. by retail of beer, wines and spirits for consumption off the
 v. premises.
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As the underlease fell to expire on March 25, 1932, the respondent presented to the appellants a claim under the Act to which I have referred limited after litigation had begun to a claim for a new lease under s. 5 of the Act. Proceedings were begun on June 1, 1931, in the Lambeth County Court by the respondent against the appellants to enforce the claim. Pursuant to s. 21, sub-s. 2, of the Act and to Order xx. (a) of the County Court Rules, 1903-1933, the respondent's claim was referred by the county court judge for inquiry and report to one of the panel of referees appointed for the purposes of the Act.

The report was made in due course. In it the referee found (inter alia) that the respondent had attached a valuable goodwill to the premises which would enable the appellants to secure a higher rent for them than they otherwise would realize and that the respondent by his method of conducting the business, by his long continued attention to it and by his skill in management as shown by the results since 1910, had attached a greater amount of goodwill to the premises than an average or normal tenant might be expected to attach.

Upon an application of the appellants to vary the report and an application of the respondent to adopt it, the matter came before the deputy judge for consideration. On March 23, 1932, the deputy judge allowed the appellants' application and dismissed the respondent's claim to be granted a new lease. This order was affirmed by the Divisional Court, but on appeal to the Court of Appeal the decisions below were reversed and the case was sent back to the county court for reconsideration, the Court of Appeal holding that the deputy judge had misdirected himself. It is of this order of the Court of Appeal that the appellants now complain.

Before explaining the nature of the questions which arise and the views which have been expressed in the Courts below upon

them it will be desirable to state the relevant provisions of the Act. H. L. (E.)

By s. 4 of the Landlord and Tenant Act, 1927, it is provided (inter alia) that subject to certain notices being given the tenant of any holding to which the Act applies shall "be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto :

" Provided that—

" (a) The sum to be awarded as compensation for such goodwill shall not exceed such addition to the value of the holding at the termination of the tenancy as may be determined to be the direct result of the carrying on of the trade or business by the tenant or his predecessors in title. . . .

" (c) In the case of licensed premises the sum payable as compensation for goodwill under this section shall not include any addition to the value of the premises attributable to the fact that the premises are licensed premises ;

" (d) The tribunal shall, in determining the amount of compensation for goodwill—. . .

" (ii) disregard any value which is attributable exclusively to the situation of the premises ; "

By s. 5, sub-s. 2, of the Act it is provided (inter alia) that where the tenant alleges and proves that, though he would be entitled to compensation under s. 4 of the Act, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he would suffer if he removed to and carried on his trade or business in other premises, he may in lieu of claiming compensation claim a new lease of the premises, and it is further provided that upon such claim being made and proceedings taken the tribunal if satisfied as to other matters (not now material) " may, if it considers that the grant

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H. L. (E.) of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy " for a period not exceeding fourteen years.

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By s. 17 of the Act the " holdings " to which this part of the Act applies are declared to extend to any lease, other than a mining lease, made whether before or after the commencement of the Act and used wholly or partly for carrying on thereat any trade or business and not being agricultural holdings within the meaning of the Agricultural Holdings Act, 1923.

By s. 21, sub-s. 1, of the Act, subject to certain provisoes (not material in this appeal), the tribunal is declared to be the county court within the district of which the premises are situated, and by s. 21, sub-s. 2, of the Act when proceedings are commenced in the county court in respect of any such claim the matter shall unless otherwise agreed or prescribed stand referred for inquiry and report to a referee to be selected by the county court from a panel of referees created for such purpose.

It is to be noted that in order to establish his right to a new lease under s. 5 of the Act the tenant must establish that he would be entitled to compensation under s. 4 and that the compensation under that section would not compensate him for the loss of goodwill which he would suffer if he removed and carried on business elsewhere.

The judgment of the learned deputy judge contained the following passages :—

" The plaintiff must satisfy the tribunal that by reason of the carrying on by him or his predecessors in title at the premises (that is to say at the ' holding ') of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto. If he proves this to the satisfaction of the tribunal he is entitled to compensation subject to the qualifications contained in the proviso at the end of s. 4, sub-s. 1, para. 2.

" The basis on which compensation is assessed under the section is the benefit accruing to a landlord by reason of an

addition to the value of the goodwill which owes its origin to the exertions or skill of the tenant. H. L. (E.)

“ Such addition must be the direct result of such exertions or skill. See clause (a) of the proviso.

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“ The plaintiff can only claim the relief which he seeks in these proceedings as tenant under the lease of 1897 and on the ground of a beneficial carrying on of the business for a period of at least five years by himself or his predecessors in title. . . .

“ No doubt the goodwill of the business has increased in value greatly since 1910, and the plaintiff contends that such increase, or at any rate a substantial part of it, is directly attributable to his personality, energy, and skill and to his expenditure of money in advertisements and other propaganda. On the other hand it is contended that the increase is entirely due to the natural advantages of an off-licence attached to premises situate, as the holding is, at the corner of Old Kent Road and a street which is the only access to and from a workmen's residential district lying behind the Old Kent Road, and to certain factors which may be called ‘ Outside factors ’ favourably affecting the goodwill.

“ There are however other factors which have a contrary effect.

“ The following are factors which have tended to cause the goodwill in this case to appreciate :

“ The swing over of the public taste from draught to bottled beers commencing about the year 1910.

“ The consequent absence of loss by reason of what was called ‘ The long pull ’ commencing about the same time.

“ The rise in wages, against which must be set off unemployment.

“ The increase in the selling price of beer against which must be set off its effect in reducing the amount purchased.

“ The improvement of the Old Kent Road from a business point of view.

“ The change in the hours for sale of drinks.

“ The erection in the year 1921 of a block of workmen's flats to which access can only be obtained by passing the holding.

H. L. (E.) " The closing in 1928 of the only rival off-licence within a radius of a quarter of a mile.

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CHARRING- " The relaxations by the landlords of the tie under the lease
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SIMPSON. " The following factors have tended to retard the appreciation
Lord Tomlin. of the goodwill.

" Unemployment; working men's clubs; increase of rates in the £; increase of price of beer; trade depression; loss of customers who came from the site now occupied by the workmen's dwellings.

" Since hearing the arguments of counsel I have read through and considered the whole of the shorthand notes of the proceeding before the referee. On the one hand, I have considered the indisputable fact that the goodwill has greatly increased in value since 1910; also the evidence as to the personality of the plaintiff, the advertisements, canvassing, distribution of hand bills and business cards, and the other methods by which the plaintiff claims to have increased the trade of the house, and the evidence as to the effect of the outside factors which have tended to retard the progress of the business and the fact that notwithstanding such factors the value of the goodwill has increased as I have stated.

" On the other hand, I have considered the factors which have tended to increase the value of the goodwill including amongst others the remarkable swing over from the sale of draught beer to that of bottled beer which began about the time when the plaintiff first occupied the premises and continued to grow until the business of an off-licence was changed to the disadvantage of on-licence businesses from a draught beer business with a percentage of about 10 per cent. for bottled beer to practically the contrary.

" I have been impressed by the evidence of Mr. Motion and Mr. Eve—witnesses of great experience who evidently gave their evidence with great care. From what they said it appears that the keeping of an off-licence house is one of the easiest trades as the tradesman has a monopoly of selling locally, and that in the case of this off-licence in this situation the trade comes to the premises because of the position of

the premises and the fact that there is a monopoly of selling drink and that an off-licence recuperates itself very quickly. H. L. (E.)

“From his report I cannot discover that the referee has taken into consideration any of the outside factors tending to cause the goodwill to appreciate except the opening of the workmen’s flats and the closing of the rival off-licence. 1935
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“The referee does not appear to me to have attached sufficient weight to the evidence of the defendants’ witnesses and in particular to the very useful and careful evidence of Mr. Motion and Mr. Eve.

“Having weighed the evidence to the best of my ability I cannot find that the plaintiff is more than a normally good tenant or that he has done more than, if so much as, any tenant of ordinary capacity and energy would normally have done, and I cannot attribute to his efforts any tangible improvement in the value of the goodwill beyond such as might have been expected from the occupancy of a tenant of normal capacity and energy. Some criticism might be made with regard to the plaintiff’s habit of prematurely destroying documents of primary importance for showing the amount and value of business transacted. This habit seems hardly consistent with exceptional business capacity. I have come to the conclusion that the plaintiff has failed to prove that by reason of the carrying on of the business by him since 1910 goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto, and these proceedings therefore fail.

“I have come to the conclusion that the referee’s findings of fact are against the weight of evidence except as to the plaintiff’s suitability as a tenant to which I will hereafter refer.”

Later on in his judgment the learned deputy judge said :
“Assuming that (contrary to the view I have taken of the evidence) the plaintiff has by special exertions, expenditure and skill caused an addition to the value of the goodwill of the business under consideration he cannot in my opinion claim compensation having regard to the provisions of clause (c), and on this ground also these proceedings fail.”

H. L. (E.) The deputy judge concluded his judgment in these terms :—
 1935 “ In my opinion the report of the referee should be varied
 CHARRING- by finding that it has not been proved to the satisfaction of
 TON & Co. the tribunal that by reason of the carrying on by the plaintiff
 v. or his predecessors in title at the premises of a trade or
 SIMPSON. business for a period of not less than five years goodwill has
 Lord Tomlin. become attached to the premises by reason whereof the
 premises could be let at a higher rent than they would
 have realized had no such goodwill attached thereto. And
 alternatively, that in the circumstances of this case the
 provisions of clause (c) of the proviso to s. 4, sub-s. 1, para. 2,
 of the Landlord and Tenant Act, 1927, debar the plaintiff
 from the relief which he seeks.”

I have read these extracts from the deputy judge's judgment at length because there has been before your Lordships' House much debate as to the meaning of the judgment.

It is not disputed that the learned judge decided two things—namely, (1.) that the respondent had failed to prove that it was by reason of the carrying on by him or his predecessors in title at the premises of the business that goodwill had become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto, and that such goodwill had become attached by reason of a number of extraneous circumstances; and (2.) that upon the true construction of proviso (c) to s. 4, sub-s. 1, no compensation could be payable in respect of licensed premises where no business except that of the sale of intoxicating liquors was carried on upon the premises. As will shortly appear, the Court of Appeal have interpreted the deputy judge's judgment as also deciding over and above these two points a third point which will be explained later on.

The Divisional Court affirmed the deputy judge taking the same view as he did of proviso (c) to s. 4, sub-s. 1, and regarding it therefore as unnecessary to consider any other question.

The Court of Appeal held that the deputy judge was wrong on both the two specific points which I have mentioned.

As to the first point, they took the view, basing themselves

upon the decision in *Llewellyn v. Rutherford* (1), that extraneous circumstances could not be regarded.

As to the second point, the Court of Appeal were of opinion that proviso (c) of s. 4, sub-s. 1, did not upon its true construction operate to exclude absolutely from compensation the tenant of licensed premises where no business except the sale of intoxicating liquors was carried on.

The Court of Appeal, however, dealt with a third point. They interpreted the judgment of the learned judge as a decision that in point of law a suitable tenant taking only ordinary exertions in trading could not show goodwill attached to the premises as a direct result of his carrying on trade at the premises. In the result, therefore, the Court of Appeal found that in all these three respects the deputy judge had misdirected himself and that the case must go back to him for reconsideration.

Sect. 1 of the Act, which deals with the payment to tenants of business premises of compensation for improvements to the premises, embodies a conception which it is easy to follow and understand. The tenant goes away. The improvements remain with the premises for the benefit of the landlord. This is not the case with s. 4. To say that the tenant of business premises shall on the termination of his tenancy be paid by the landlord compensation for goodwill is to say something which does not express any intelligible conception because the goodwill of the business belongs to the tenant and is attached to the tenant's business which ex hypothesi he removes. It may indeed be doubted whether the term goodwill in its strict sense is appropriate to be introduced into a case where some improvement of rental value has resulted to the landlord from the carrying on of a business on the premises by a previous tenant. It is unfortunate that the section has not been framed with a clearer exposition of its general purpose and with more precision in the use of terms. The section, however, seems to contemplate that in certain cases something in the form of increased value will, after the termination of the tenancy and as the result of the tenant's

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business activities during his tenancy, adhere to the premises in the landlord's hands, but that the measure of any compensation to the tenant in respect of it is not what he loses but what the landlord gains.

An analysis of the section suggests that two steps have to be taken by the tenant. The first step is to prove that, by reason of the carrying on by the tenant or his predecessors in title at the premises of a business for a period of not less than five years, "goodwill" has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such "goodwill" been attached. In order to establish this, two questions have to be answered—namely, (1.) has goodwill become attached to the premises so as to increase its rental value? and if so, (2.) is that attachment due to the carrying on of the business by the tenant or his predecessors in title?

The second step is, under proviso (a) to establish the measure of the compensation. The measure is not the value of the goodwill which the tenant loses by giving up the business, but what the landlord gains by such addition, if any, to the value of the holding as is the direct result of the carrying on of the business by the tenant or his predecessors in title.

Now the deputy judge held that the tenant in the present case had failed to take the first step, because, although goodwill was proved to have become attached to the premises so that they could be let at a higher rental, the attachment was due to extraneous circumstances which would have been equally operative whoever had carried on the business. The consideration of extraneous circumstances seems to me to be inevitable in order to deal with the matter in accordance with the section analysed as I have analysed it. I do not think that the case of *Llewellyn v. Rutherford* (1), upon which the Court of Appeal relied, bears on the matter. The position of an outgoing tenant selling his business and his lease to an incoming tenant buying them differs materially from the position of a tenant whose lease is terminating. I think therefore that the Court of Appeal were wrong in this

(1) L. R. 10 C. P. 456.

respect. I differ from them with less hesitation than I otherwise should as I am satisfied, from what he subsequently said in *Whiteman Smith Motor Co. v. Chaplin* (1), that Scrutton L.J. changed his view and thought that in the present case too much weight had been attributed to *Llewellyn v. Rutherford*. (2)

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I differ also from the Court of Appeal upon what I have called the third point. I think the Court has misconstrued the judgment of the deputy judge. Where the deputy judge speaks of the goodwill of the business having increased in value, he is really referring, I think, to the increase in trade ; and what he is deciding is that, having regard to the peculiar monopoly which these premises enjoyed, no goodwill could in fact become attached to them by reason of the carrying on of the business by the tenant in the ordinary way, and that such a result could only come about by special exertion, expenditure and skill on the part of the tenant. The emphasis is on the phrase " in the case of this off-licence in this situation." The finding is a finding of fact in relation to this particular case and not, as interpreted by the Court of Appeal, a finding of general law upon the construction of the section.

These considerations lead me to the conclusion that the appeal should be allowed, as, if the deputy judge has not (and I do not think that he has) misdirected himself in respect of either of the two matters last mentioned, there is no ground upon which his judgment can properly be interfered with.

It would no doubt be permissible, having reached this conclusion, to leave the case without dealing with the second point as to the effect of proviso (c).

The question, however, is of importance outside the merits of this case and has been much debated before your Lordships and has been adjudicated upon in the Courts below. I therefore think it both proper and advisable to express an opinion upon it.

In this respect I agree with the Court of Appeal and differ from the Divisional Court and the deputy judge.

The proviso does not say that no sum shall be payable as

(1) [1934] 2 K. B. 35.

(2) L. R. 10 C. P. 456.

H. L. (E.) compensation for goodwill in the case of licensed premises
 1935 where no business is carried on except that of the sale of
 CHARRING- intoxicating liquors, though that is what the deputy judge
 TON & CO. thinks it means. On the contrary its introductory phrase
 v. " In the case of licensed premises the sum payable as compen-
 SIMPSON. sation " suggests the direct contrary—namely, that a sum may
 Lord Tomlin. be payable, although the amount of it may be cut down.

My Lords, in my judgment the order of the Court of Appeal should be reversed and the judgment of the deputy county court judge should be restored. I suggest to your Lordships that having regard to the nature of the case and the course which it has taken there should be no costs on either side of this appeal or of the proceedings in the Divisional Court or the Court of Appeal. I move your Lordships accordingly.

LORD RUSSELL OF KILLOWEN. My Lords, I agree with the opinion which has just been delivered by the noble Lord on the Woolsack, and, but for the fact that we are reversing the decision of the Court of Appeal, I would not trouble your Lordships with any observations of my own. They will, however, be brief.

Sect. 4 of the Landlord and Tenant Act, 1927, is a novel piece of legislation which aims at forcing a landlord to make, in certain specified circumstances, a payment to a tenant who is quitting his holding at the termination of his tenancy. The payment is called " compensation for goodwill," a phrase which seems to me quite inappropriate to describe a payment which, when the section is examined, is a payment in respect of an improved rental value attaching to the premises. The specified circumstances which have to be proved by the tenant are (1.) that by reason of the carrying on, by him or his predecessors in title at the premises, of a trade or business for a minimum period of five years, a goodwill (to use the words of the section) " has become attached to the premises," and (2.) that by reason of that " goodwill " the premises could be let at a higher rent than they would have realized had no such " goodwill " attached. If the tenant proves those two facts to the satisfaction of the appointed tribunal, he has established

his right to compensation, but the quantum thereof is subject to various provisos. Proviso (a) cuts down the sum to be awarded to such addition to the value of the holding as is the direct result of the carrying on of the trade or business by the tenant or his predecessors in title. Proviso (c) cuts out all addition to the value of the premises attributable to the fact that the premises are licensed premises. Proviso (d) cuts out all value which is attributable exclusively to the situation of the premises.

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The county court judge, who is the appointed tribunal, is the sole judge of the facts, and his findings in regard to them are not subject to review unless he has in regard to some relevant matter misdirected himself in arriving at his findings.

In the present case the deputy judge has, as I read his judgment, after taking into consideration all relevant circumstances affecting the trade or business carried on at these premises, found as a fact that the tenant had failed to prove to his satisfaction that, by reason of the carrying on by the tenant at the premises of a trade or business, a goodwill has become attached to the premises by reason whereof a higher rental value has resulted. In other words, the tenant has failed to prove what I have called above the specified circumstances. He bases this finding upon evidence which included the evidence of Messrs. Motion and Eve, who established, among other facts, that in the case of these particular off-licensed premises the trade came to them because of their position and their monopoly of selling drink.

The Court of Appeal presided over by Scrutton L.J. has held that this finding of the deputy judge could be set aside, and the matter sent back for reconsideration on the ground that he had misdirected himself as to his power under the Act to take into consideration extraneous circumstances, founding this view on *Llewellyn v. Rutherford*. (1) That case (which was a case of a tenant selling his business and his lease to a purchaser) has no relevance to the construction of the present statute, under which the tribunal has in my opinion both a power and a duty to take all relevant circumstances

(1) L. R. 10 C. P. 456.

H. L. (E.) into consideration in arriving at its findings of fact. The question came up later before a Divisional Court, composed in 1935 of Scrutton and Maugham L.JJ., in the case of *Whiteman* fact of *CHARRINGTON & CO. v. Smith Motor Co. v. Chaplin* (1); and I do not think that it is too much to say that Scrutton L.J. altered his opinion upon this point and that the two decisions cannot, upon this point, stand together. In my opinion the decision of the Court of Appeal in the present case was wrong, and the deputy judge was not only entitled but bound to take all relevant circumstances into consideration. There was accordingly no misdirection and the deputy judge's finding of fact is not open to review. The outgoing tenant has failed to establish his right to "be paid by his landlord compensation for goodwill." The deputy judge might, as it seems to me, also have held upon his view of the facts that the quantum of the compensation claimed must, under proviso (a), be nil, as the addition (if any) to the value of the holding was not the direct result of the carrying on of the trade or business.

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I need only make three further remarks. I agree with what the noble Lord on the Woolsack has said as to the misconstruction by the Court of Appeal of the deputy judge's judgment. I agree with the noble Lord's opinion as to the effect of proviso (c). I agree with the motion which he has moved.

LORD MACMILLAN. My Lords, the question whether the respondent is entitled to the new lease which he claims under s. 5 of the Landlord and Tenant Act, 1927, depends upon whether he is entitled to compensation under s. 4 of that Act. The general purpose of s. 4 is sufficiently plain; it is to provide, under certain specified conditions, for the payment of compensation to a tenant at the termination of his lease in respect of any goodwill that has become attached to the premises by reason of his having carried on a trade or business in them. The main conditions affecting the right to compensation in respect of such goodwill, if it be proved to exist, are (1.) that it must have the effect of rendering the premises lettable at a

higher rent than could have been obtained if no such goodwill had become attached to them ; and (2.) that the compensation must not exceed such addition to the value of the premises as can be shown to be the direct result of the tenant having carried on his trade or business in them. Enhancement of the letting value of the premises at the termination of the lease, directly due to the carrying on of a trade or business in the premises by the tenant, is thus at once the condition and the maximum measure of the compensation payable. This enhancement is the benefit which accrues to the landlord and for which he has to pay ; it is an addition which the tenant has made to the value of the premises and which he leaves behind him when he quits possession.

Now it is said in the first place by the appellants that the effect of proviso (c) to s. 4, sub-s. 1, of the Act is that a tenant can have no claim to compensation for goodwill at all if the trade or business which he has carried on in the premises has been solely that of a licence holder dealing in intoxicating liquors, presumably on the ground that any goodwill which in such a case may have become attached to the premises is to be attributed entirely to the fact that the premises were licensed and that none of the enhanced value of the premises, if any results, can be regarded as directly due to the tenant having carried on his trade or business in them. This reading of the proviso commended itself to the learned deputy county court judge and to the Divisional Court, but not to the Court of Appeal. I agree with the learned Lords Justices in holding it to be erroneous. I cannot find anything in the proviso or elsewhere in the section or in the Act to exclude licensed premises from the operation of s. 4. Sect. 17 expressly excludes premises held under a mining lease and agricultural holdings within the meaning of the Agricultural Holdings Act, 1923, from the holdings to which Part I. of the Act is made applicable, but it makes no reference to licensed premises. The proviso does not say that in the case of licensed premises no sum shall be payable as compensation. What it says is that "in the case of licensed premises the sum payable as compensation for goodwill under this section is not to include

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H. L. (E.) any addition to the value of the premises attributable to the fact that the premises are licensed premises." To my mind
 1935
 CHARRING- this plainly indicates that under the section compensation
 TON & Co. for goodwill may be payable in the case of licensed premises.
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 SIMPSON. It was suggested that the proviso means that in the case of
 Lord Macmillan. licensed premises the tenant is to have a claim to compensation
 if, but only if, and to the extent that, he carries on some
 other trade or business in the premises besides that of a dealer
 in intoxicating liquors. This suggestion is ingenious but far-
 fetched. It is not what the Act says and it is in my opinion an
 unwarranted conjecture rendered necessary in order to support
 an unnatural reading. Premises which are licensed have an
 added value by reason of the mere fact that they are licensed.
 This is the factor that is to be excluded in assessing the
 compensation for goodwill payable to the tenant of licensed
 premises. The tenant is not precluded from proving, if he
 can, that as a direct consequence of his having carried on the
 trade or business of a licence holder in the licensed premises
 goodwill entitling him to compensation under the Act has
 become attached to them.

The learned deputy judge accepts it as an "indisputable fact" that the goodwill in this case "has greatly increased in value since 1910," when the respondent's tenancy is assumed by him to have begun. But he nevertheless finds it not proved that by reason of the respondent having carried on his trade or business in the premises goodwill has become attached to the premises to the effect of increasing their lettable value. These findings are not necessarily inconsistent. Goodwill may come into existence or be enhanced during a tenancy and yet not answer the statutory requirements which condition the emergence of a claim of compensation. It may not result in an enhanced letting value of the premises, or if it does add such value to the premises the added value may not be the direct result of the tenant having carried on his trade or business in the premises. There may have been adventitious and extraneous causes at work not in any way attributable to the carrying on by the tenant of his trade or business. There may, for example, be a large influx of population to the neighbourhood. Added

value attributable to this cause would not be a direct result of the tenant's carrying on of his trade nor would it form an appropriate basis or measure of compensation to him.

The chief controversy before your Lordships centred round the question whether the learned deputy judge in reaching his conclusion adverse to the respondent's claim had misdirected himself in law. Your Lordship on the Woolsack has quoted the critical passages from the judgment. These passages are taken by Scrutton L.J. as indicating that in the view of the deputy judge "a suitable tenant taking only ordinary exertions in trading cannot show goodwill attaching to the premises as a direct result of his carrying on trade at the premises." If this correctly represents the import of the passages in question, I agree with the learned Lord Justice and his colleagues that they embody an erroneous view of the law. The statute nowhere lays it down that a tenant in order to qualify for compensation must give evidence of his having exhibited extraordinary capacity or energy or of his having done something more than a normally efficient tenant would have done. The deputy judge has no doubt employed certain expressions which taken by themselves lend support to the view of his judgment taken by the Court of Appeal. But when these expressions are read in the light of their whole context I think that it is reasonably clear that the deputy judge did not intend to enunciate it as a proposition of law governing the interpretation of the statute that a tenant must in all cases do more than a tenant of ordinary capacity and energy would normally have done if he is to have a statutory claim to compensation. He was dealing with the circumstances of the particular case before him, in which he had evidence that "in the case of this off-licence in this situation the trade comes to the premises because of the position of the premises and the fact that there is a monopoly of selling drink." With this evidence before him to the effect that the goodwill was not the personal creation of the respondent, arising directly by reason of the respondent's carrying on of his business in the premises, the deputy judge, as I read his judgment, took the view that the respondent must show that he had himself in some way directly created

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H. L. (E.) goodwill over and above the goodwill which must inevitably
 1935 become attached to the premises from their favourable
 CHARRING- circumstances, quite irrespective of the particular tenant
 TON & Co. carrying on business in them. For this he desiderated some
 v. evidence of special activity on the part of the respondent,
 SIMPSON. and not being satisfied that there was any adequate evidence
 Lord Macmillan. of this kind he reached the conclusion that the respondent
 had not himself by his carrying on of his trade directly contributed any added value to the premises. I am not prepared, on this reading of his judgment, to hold that the deputy judge misdirected himself in law in reaching his conclusion. On this point therefore I differ from the Court of Appeal and agree with your Lordships.

I must also express my dissent from the view taken in the Court of Appeal and thus expressed by Scrutton L.J. (1) : "Once a higher rental value is shown at the end of the tenancy as compared with a low value at its commencement, it appears to me there is no ground in law for saying no goodwill has attached to the premises. During the tenancy it would not in my opinion be possible for an incoming tenant to say : 'I will pay you nothing for goodwill, because the possibility of profit is entirely due to extraneous circumstances.' " Greer L.J. to the same effect says of the tenant (2) that it is not "relevant to inquire whether he had acquired the additional business by reason of a change in the character of the neighbourhood, or by reason of the lapse of some of his competitors in the neighbourhood." These expressions of opinion appear to me to overlook, first, that the case is not one of a transaction between an incoming and an outgoing tenant but one of statutory compensation payable by a landlord to an outgoing tenant on the analogy of compensation for physical improvements ; and, second, that the addition of value must be the direct result of the carrying on of his trade by the tenant. I can see no reason why the tenant should be compensated for added value which he has not himself created by his own trading activities but which is due to extraneous causes. An incoming tenant may well make payment to an outgoing tenant in

(1) [1934] 1 K. B. 78.

(2) Ibid. 86.

respect of the goodwill as he finds it, however arising, but the landlord is not under the Act a purchaser of the goodwill as it stands ; he has to pay statutory compensation to the outgoing tenant in respect of something which the tenant has himself directly created and which he leaves behind in the shape of an added letting value in the premises. The task of discrimination among the elements contributing to added value may be difficult, but the statute has imposed it.

On the whole matter I agree that the appeal should be disposed of as your Lordship on the Woolsack has proposed.

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Order appealed from reversed. Judgment of the deputy judge of the County Court of Surrey holden at Lambeth restored : Ordered that all parties do pay their own costs in the Divisional Court and in the Court of Appeal and also the costs of the appeal to this House. Further ordered that the respondent do repay to the appellants the costs already paid by them in the Divisional Court and in the Court of Appeal. Cause remitted back to the County Court of Surrey holden at Lambeth to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 15, 1935.

Solicitors for appellants : *Godden, Holme & Ward.*

Solicitors for respondent : *Sprinz & Sons.*

[HOUSE OF LORDS.]

H. L. (E)*	MECHANICAL AND GENERAL INVEN-	} APPELLANTS ;
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	AND	
	AUSTIN AND THE AUSTIN MOTOR	} RESPONDENTS.
	COMPANY, LIMITED	
ET E CONTRA.		

Contract—Consideration—Breach—Information imparted in Confidence—User by recipient for his own purposes—Agreement for Licence—Evidence of Agreement—Practice—Trial before judge and jury—Verdict against Weight of Evidence—Excessive Damages—Power of Court of Appeal to set aside Verdict—Rules of the Supreme Court, 1883, Order LVIII., r. 4.

Patentees of a system of mechanical fittings for the bodies of motor-cars applied in May, 1928, for provisional protection in England in respect of certain particulars of the system. In July, 1928, the patentees approached certain manufacturers in this country and gave them certain information verbal and documentary with a view to development of the system and its application to the manufacturers' cars to the advantage of both parties. The information was given in confidence and for the purposes of a future agreement that the patentees should give and the manufacturers should accept a licence to use the patent rights of the patentees.

In an action tried before a judge and jury the jury found that the two following agreements had been entered into between the patentees and the manufacturers: (1.) that the manufacturers should accept a licence from the patentees, and (2.) that the manufacturers should use the information disclosed only for the purposes of the licence. They also found that the manufacturers had committed breaches of both the agreements, and they awarded heavy damages in respect of both breaches. The manufacturers appealed. The Court of Appeal held that the first agreement was not proved, and that the second had been proved, but that the damages for the breach were only nominal.

The patentees appealed to this House to establish the first agreement or to restore the verdict of the jury as to the damages for breach of the second agreement. There was a cross-appeal by the manufacturers to reverse the decision of the Court of

* *Present*: VISCOUNT SANKEY L.C., LORD BLANESBURGH, LORD ATKIN, LORD MACMILLAN, and LORD WRIGHT.

Appeal upholding the second agreement and the breach thereof :— H. L. (E.)

Held (by Viscount Sankey L.C., Lord Blanesburgh, Lord Atkin, Lord Macmillan, and Lord Wright), that the first agreement was not proved ; *held* also, that the second agreement was proved ; for that there was ample evidence to support the findings of a contract and the breach thereof, the giving of the information for a particular purpose being, on the analogy of a contract of bailment, good consideration for a promise not to use it for any other purpose, and its use for another purpose being a breach.

Decision of the Court of Appeal affirmed on this point.

Held (by the Lord Chancellor, Lord Atkin, Lord Macmillan and Lord Wright ; Lord Blanesburgh dissenting), that the verdict of the jury assessing damages for breach of the second agreement must be restored.

Decision of the Court of Appeal on this point reversed.

Principles which should guide an appellate Court in reviewing the verdict of a jury.

When it is decided that a case is to be tried by a jury, that tribunal is the only judge of the facts, and no appellate tribunal can substitute its finding for that of the jury. The appellate Court has a revising function to see, first, whether there is any evidence in support of the issue found by the jury ; and, secondly, whether the verdict can stand as being one which reasonable men might have come to. If on the latter question it is obvious that no verdict for the plaintiff on all the available evidence could be supported, the Court may save the waste of time in ordering a new trial, which could have only one result, by ordering the verdict and judgment to be entered for the defendant.

Metropolitan Ry. Co. v. Wright (1886) 11 App. Cas. 152 and *Banbury v. Bank of Montreal* [1918] A. C. 626 followed. *Praed v. Graham* (1889) 24 Q. B. D. 53 ; *Allcock v. Hall* [1891] 1 Q. B. 444 ; and *Johnston v. Great Western Ry. Co.* [1904] 2 K. B. 250 approved.

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APPEAL and CROSS-APPEAL from an order of the Court of Appeal varying the judgment of Hawke J. in an action tried before the learned judge and a special jury. The facts are stated in the opinion of the Lord Chancellor. The following short statement will indicate the nature of the case.

The appellants were the plaintiffs in the action. They were a British company and one Edouard Ernest Lehwess, a French subject resident in Paris and a director and apparently the general manager of the company. The appellants and one Harry Smith were grantees of letters patent No. 321962 covering a mechanical system known as the Solcar System for adaptation to the bodies of motor-cars.

H. L. (E.) The respondents, defendants in the action, were a company engaged in the manufacture of chassis and bodies of motor-cars in Birmingham, and Sir Herbert Austin the managing director of the respondent company. A firm of Stephen Watkins, Son & Groves acted as patent agents for the respondents.

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The matters in dispute were whether either or both of two agreements alleged by the plaintiffs and denied by the defendants had been entered into between the parties. With regard to the first agreement: In July, 1928, the plaintiff Lehwess communicated to the defendant Sir Herbert Austin certain particulars of the construction of the Solcar System and offered the defendant company a licence under the patent, a provisional specification for which had been filed in the preceding May. This was done with a view to future business between the two companies. In August, 1928, the plaintiff Lehwess made to the defendant Austin a general disclosure of the Solcar System and demonstrated the working of the system upon a Chenard car at the defendants' works at Birmingham, and put the plaintiffs' patent agents, Messrs. Gill & Co., into communication with Messrs. Stephen Watkins, Son & Groves.

The plaintiffs alleged that the information imparted as aforesaid was given and received in confidence, and that the defendants in consideration of the disclosure made to them agreed not to use the information except under a licence from and for reward to the plaintiffs. This alleged agreement was referred to as the confidence agreement.

The defendants then applied for letters patent, basing their application upon a sketch drawn by the defendant Austin after the inspection of the Chenard car and after receiving from his patent agents on September 1, 1928, the complete specification and drawings of the plaintiffs' patent. The application for letters patent was lodged on September 8, 1928, at the Patent Office and foreign applications based thereon were made. With the exception of one immaterial detail, letters patent were granted in June, 1929, upon the defendants' specification and remained on the register until

revoked in July, 1931. Letters patent were also granted in Canada and France, the defendant Austin in each case declaring himself to be the true and first inventor of the subject matter of the patented invention.

The second agreement was alleged by the plaintiffs to have been entered into on September 3, 1928, between the plaintiffs and the defendants whereby the defendants agreed to accept from the plaintiffs a licence for the user of their system upon terms proposed by the plaintiffs in a letter of August 31, with subsequent alterations as to the time within which and the manner in which the defendants should give notice of their intention to exercise an option to be given to them "subject to a proper licence contract being entered into by our two respective companies." The alleged agreement was referred to as the licence agreement.

At the trial of the action the jury found in answer to questions numbered 6 and 7 that the confidence agreement had been entered into between the parties and broken by the defendants, and they assessed the damages for the breach at 35,000*l.* They found also that the defendants had agreed to take a licence from the plaintiffs and had broken this agreement also, and that the damages for this breach were 65,000*l.*

The defendants appealed. The Court of Appeal (Lord Hanworth M.R. and Slessor and Romer L.JJ.) held that the issue upon the licence agreement ought not to have been left to the jury, as it was clear from subsequent letters of and statements of the plaintiffs that no such agreement had been concluded between the parties. As to the confidence agreement they held that there was evidence of such an agreement and that, if made, it had been broken ; but that the damages for the breach were merely nominal. The Court accordingly ordered judgment to be entered for the plaintiffs for 40*s.*

The plaintiffs appealed to this House on the grounds (1.) that the question whether the licence agreement had been entered into was a question for the jury, and that their finding was supported by the evidence ; and (2.) that there was also evidence to support the verdict for 35,000*l.* for breach of the confidence agreement.

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H. L. (E.) There was a cross-appeal by the defendants, who contended that there was no contractual relation between the plaintiffs and the defendants and no confidential relation the breach or violation of which would sound in damages.

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Jan. 24. *Hon. Sir Stafford Cripps K.C.* and *G. H. Lloyd-Jacob* for the appellants. [In support of the alleged licence agreement counsel cited *Winn v. Bull* (1); *Lucas v. Hall* (2); and *Hillas & Co., Ltd. v. Arcos, Ltd.* (3), and, on the question of damages for breach of such an agreement, *Abrahams v. Herbert Reiach, Ltd.* (4); but on this part of the case the House was clearly of opinion, for the reasons laid down in the opinion of Lord Wright, that the decision of the Court of Appeal must be affirmed and that this alleged agreement had not been proved.]

With regard to the confidence agreement, accepting the decision of the Court of Appeal in the appellants' favour that this agreement was proved, there was plenty of evidence to support a verdict for substantial damages. That being so, the jury were the tribunal to assess the amount. A jury may assess damages at a larger sum than a Court of Appeal would award, but that is no warrant for the Court to substitute its award for that of the jury: *Praed v. Graham* (5); *Johnston v. Great Western Ry. Co.* (6)

Upon the question whether the confidence agreement had been established in fact:—

Feb. 5. *Sir William Jowitt K.C.*, *K. E. Shelley*, and *Patrick Devlin* for the respondents (appellants in the cross-appeal). There is no suggestion of any express agreement such as the appellants insist on. The alleged agreement, if it exists, is based on inference. In the circumstances in which the information was imparted there was nothing to imply that it was only to be used in order that the respondents should subsequently apply for and obtain a licence from the appellants. It was not necessary in order to give business efficacy to the transaction that any such term should be

(1) (1877) 7 Ch. D. 29.

(2) [1899] W. N. 92.

(3) (1932) 147 L. T. 503.

(4) [1922] 1 K. B. 477.

(5) 24 Q. B. D. 53.

(6) [1904] 2 K. B. 250.

inferred: see *The Moorcock*, per Bowen L.J. (1) The transaction involved no confidential relation between the parties. They were at arms' length, each looking to their own individual advantage. The appellants are really complaining of something in the nature of a breach of trust or confidence, for which relief, if there be any, must be sought in a Court of equity, and not by way of damages at common law.

Feb. 12. *Hon. Sir Stafford Cripps* K.C. replied.

The House took time for consideration.

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March 14. VISCOUNT SANKEY L.C. My Lords, this is an appeal and cross-appeal from an order of His Majesty's Court of Appeal (England) dated March 27, 1934, varying the judgment of Hawke J. dated November 15, 1933, after a hearing by him and a special jury.

The appellants, who were the plaintiffs in the Court of first instance, are Dr. Edouard Ernest Lehwess, a French subject resident in Paris, and a British company, Mechanical and General Inventions Company, Ltd., of which he is a director. The respondents, who were defendants in the Court of first instance, are Sir Herbert Austin and the Austin Motor Company, Ltd., Sir Herbert being the chairman of directors of that company. A firm of Stephen Watkins, Son & Groves, who are chartered patent agents and who acted for Sir Herbert and the Austin Company, were also defendants in the Court of first instance. The action was for damages for breach of contract and conspiracy. Substantially, the appellants relied upon two alleged agreements.

The questions raised by this appeal are:—

(a) Whether the Court of Appeal was right in law in setting aside a finding by the jury that there was an agreement between the appellants and the respondents, the Austin Motor Company, Ltd., giving the respondent Company an option for a licence under letters patent then being applied for by the appellants, upon the ground that no jury properly directed could reasonably find that there was any such agreement; and

H. L. (E.) (b) Whether the Court of Appeal was right in holding that upon the evidence only nominal damages could result from the breach by the respondent of another agreement by which certain information, to be communicated by the appellants to the respondents, relating to the said application, should be used confidentially, that is, only for certain specified purposes, and in setting aside a finding of the jury that the damages resulting from the breach of that agreement were 35,000*l.*, and substituting therefor a finding of nominal damages—namely, 40*s.*

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The appellants were patentees of a system of fitments for motor-car bodies of the "sunshine roof" type, having upon May 22, 1928, applied for provisional protection in this country in respect of certain features thereof under number 14956/28. The said system was known as "the Solcar System." In July, 1928, the appellant Mr. Lehwiss approached the respondent Sir Herbert Austin giving him certain particulars (including a *mémoire descriptif* and a sheet of drawings) relating to the Solcar System, with a view to interesting him in its development in this country in connection with Austin motor-cars. The appellants, on August 2, 1928, filed at the Patent Office a cognate provisional specification under number 22412/28 and a complete specification with claims covering both provisional specifications. Later in the same day Mr. Lehwiss at the invitation of Sir Herbert Austin visited the works of the respondent Company at Longbridge, Birmingham. The Solcar System was outlined by Mr. Lehwiss to Sir Herbert Austin, and the appellants contended that as a result thereof it was agreed that certain information should be disclosed by the appellants to the respondents, and in particular the patent documents and drawings which had been filed at the Patent Office, upon the terms that the information and documents were to be used confidentially only, and were not to be disclosed to others except for the purpose of deciding whether the respondents desired to become licensees of the patent. This alleged agreement has been conveniently called the "confidence agreement."

With regard to the second alleged agreement, Mr. Lehwiss

and Sir Herbert Austin met on September 3, 1928, and had before them a letter of August 31. One of the main issues at the trial was whether at this meeting a concluded oral agreement was reached between the parties. The appellants contended that a binding agreement was reached upon the terms set out in the said letter subject to certain alterations as to the time and manner of the giving of notice by the respondent Company of their intentions with respect to the exercise of the options given. This agreement has been conveniently called the "licence agreement."

The conspiracy alleged was a combination between all three of the defendants to commit the alleged breach of the confidence agreement. The defendants relied primarily upon a denial that either agreement had ever been made or that there had been any conspiracy.

The action was tried before Hawke J. and a special jury in the King's Bench Division. The trial began on October 18, 1933, and lasted 14½ days. The jury found that both agreements had been made and broken and that the conspiracy alleged had been entered into by Sir Herbert and the Austin Company but not by the firm of Watkins. They awarded 63,550*l.* as damages for breach of the licence agreement and 35,000*l.* as damages for breach of the confidence agreement and for conspiracy.

The claims under the two agreements were alternative in the sense that the appellants, as they conceded, could not have suffered any damage under the breach of the confidence agreement if the licence agreement were implemented. The learned judge directed judgment to be entered for the appellants against the Austin Company for 63,550*l.* with costs, and against Sir Herbert Austin and the Austin Company for 35,000*l.* with costs, with the proviso that any sum recovered by the plaintiffs under either of the judgments should be taken to be in satisfaction pro tanto of the liability under the other judgment. There was no evidence that the Austin Company had acted in the matter through any agent other than Sir Herbert himself; but the judge allowed the finding of a conspiracy between the two to stand.

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H. L. (E.) The defendant firm of Watkins was successful in the only
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 AND
 GENERAL but the judge ordered that the plaintiffs should recover such
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The unsuccessful defendants appealed and the appeal was heard before the Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.) on and after February 12, 1934, the arguments occupying 10½ days. Judgment was delivered on March 27, 1934, and was unanimous. The Court set aside the judgment on the licence agreement on the ground that no jury could reasonably have found that such an agreement had been made. The Court refused to disturb the finding of the jury that the confidence agreement had been made and broken, but they found that no substantial damage had been suffered by reason of the breach and reduced the amount of the judgment to 40s. The whole costs of the appeal were awarded to the appellants, and the Court ordered that there should be no costs, on either side, of the proceedings in the Court of first instance.

The issues were simple—namely, whether the two agreements were made, and if so, were they broken, and what were the damages? Unfortunately, however, the facts were of a somewhat complicated character, as may be gathered when one considers that the case for the appellants occupied 19 pages of print and contained 17 reasons why the Court of Appeal was wrong and the case for the respondents occupied no less than 77 pages of print and contained 13 reasons why the Court of Appeal was wrong on certain issues. The transcript of the proceedings before the learned judge occupies nearly 1000 closely printed pages.

I will now state the facts as briefly as possible, taking first the licence agreement. Whether there was such an agreement depends primarily upon the interview which took place between Mr. Lehweß and Sir Herbert Austin on September 3, 1928, and upon this the jury saw and heard both these gentlemen. It is enough to say that they accepted the evidence of Mr. Lehweß and did not believe the evidence of

Sir Herbert Austin—a fact which is not surprising having regard to the admissions of Sir Herbert Austin made in the course of his cross-examination. No doubt if the only material before the jury had been the evidence of these two gentlemen, it would have been open to counsel for Sir Herbert Austin to argue that his evidence should be accepted and to suggest improbabilities in the evidence of Mr. Lehwiss, and on that it would have been difficult to impeach a verdict for the plaintiff. The matter, however, does not entirely depend upon what took place at this interview. There is a very large amount of correspondence which has to be taken into account and carefully weighed and considered. Especially are there a number of letters in July and August of 1929 written by Mr. Lehwiss which throw very great doubt upon his story. It may well be that at the time of the interview he thought that he had got an agreement with Sir Herbert Austin, but the letters point to quite an opposite conclusion. For example, a letter of July 20 from one company to the other, where Mr. Lehwiss's Company say "we should like to know whether you are willing to adopt our Solcar Hood licence or not. Our Mr. Lehwiss, who has been conducting these negotiations personally with Sir Herbert Austin is most anxious that we should come to some final arrangement with your firm before we offer our system elsewhere." Again on July 27 Mr. Lehwiss's Company write: "We should be glad if you will give us an appointment at the latest towards the middle of next month to try and settle on a definite agreement in this matter." Sir Herbert Austin writes on July 30: "I am still awaiting the copies of the patent specifications which you promised to send to me showing what rights you could give us a licence for to manufacture this type of body." And Mr. Lehwiss writes on August 1 to Sir Herbert Austin: "I sincerely trust that round about August 15 you will be able to see me at Northfields or in London, so as to settle something regarding the manufacture of the Solcar."

Now these letters upon their face were really fatal to the contention that there was any such agreement as Mr. Lehwiss no doubt thought he had concluded upon September 3 in

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the previous year. Both gentlemen were examined and cross-examined upon these letters and no satisfactory explanation was given by Mr. Lehwiss of letters which showed almost to demonstration that the agreement that he thought he had concluded had not really been arrived at. It is true that the jury found that such an agreement had been made and I should be very loath to set aside any verdict of a jury arrived at after they had seen the witnesses and heard them. I cannot help thinking, however, that in the present case, after a prolonged trial and thousands of questions in examination and cross-examination, it was impossible for the jury to have kept all the facts in their minds. Both in the Court of Appeal and in your Lordships' House we have had the advantage of a transcript of the shorthand note, a copy of all the letters and a book containing all the documents. By one counsel or another we have been repeatedly referred to letters and to passages in the evidence which we had in front of us in order that we should see them and weigh them. If the jury had had the same advantages as we have had, in this long and complicated case, of having such a transcript of the evidence before them and the whole of the correspondence under their eyes, they could not have arrived at the conclusion that the licence agreement was made. I agree with the Master of the Rolls who says that no jury properly directed could reasonably find that there was any such agreement and the verdict on this point must be set aside. In reaching this result I must not be thought to impugn the ability of the jury to come to a proper verdict, but rather to stress the difficulty of their task. The appeal, in so far as it concerns the licence agreement, must be dismissed.

With regard to the confidence agreement, the appellants are in this position that they have in their favour a verdict of the jury for 35,000*l.*, though the judgment of the Court of Appeal is for nominal damages of 40*s.* only. It is unnecessary to lengthen this judgment by reciting all the facts and the considerations for or against the verdict. The real point at issue is whether there was evidence on which a jury properly directed could come to the conclusion that the confidence

agreement had been made and broken. There are no such letters as there were in the case of the licence agreement to throw any doubt upon this and there were abundant facts upon which a jury were entitled to come to the conclusion they did. I can see no misdirection by the learned judge and I again find myself in agreement with the learned Master of the Rolls where he says "there is evidence given by Mr. Lehwiss that the documents were sent to the defendant Austin on the basis of an agreement that they should be treated as confidential and only used for the purpose of considering whether a licence to use the patent should be taken or not." The one difficulty is the question of damages. Were the Court of Appeal right in setting aside the verdict of the jury, 35,000*l.*, and awarding only nominal damages of 40*s.*? Undoubtedly 35,000*l.* is a very large amount, but it must be remembered that this was essentially a case for the jury to assess damages. If there was an agreement and if there had been a breach of it, it is very difficult to say that the jury were wrong. To begin with, it is impossible to say it was a case for nominal damages only. What are the facts? It must be remembered that the jury were entitled to take into consideration that one of the things that might have happened was that the Austin Company, a great and prosperous concern, might have taken and pushed the invention. The hood was the sort of hood which might have got a good market. It was a good proposition and it was actually put on the road and advertised by the Austin Company. There was evidence as to the number of cars upon which a rival roof was placed and the profits derived therefrom. Over and above that, when the time arrived at which Mr. Lehwiss's patent would have been dealt with not only was there a slump throughout the country, but a rival patent had got in first. It was said that Mr. Lehwiss really waited because he thought he had a licence agreement, which turned out not to be a fact, and that therefore he is to a very great extent the author of his own wrong or misfortune, and it was due to his dilatoriness that the patent was not a success. But the learned judge told the jury that they must take

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H. L. (E.) this matter into account. He says: "To a certain extent, of course, your damages will have to be estimated. I can see that; but they must be as near the actual truth as you can get from the evidence and, of course, I say that at this moment—I shall have to return to it—but I say that at this moment because of the minorization or lessening of the damages from his lack of diligence, it must be very difficult." The judge later on says: "Well, on whatever date you think it would have been reasonable for him to say 'Well, I am dealing with a lot of people who do not intend to carry out their bargain and do not intend to do anything, and I must do what I can'; when you have decided in your own mind what would be a reasonable date for him to take up that attitude, you have then got the even more difficult question; that is to say, what do you think he could have made, with reasonable diligence, after that date?"

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It was pointed out to the jury that if Sir Herbert Austin had turned the invention down in November, instead of, as it was put in the Court of Appeal, "keeping Mr. Lehwiss on a string," the plaintiffs might have been able to interest some other big motor company in their invention and to get them to take it. In other words, the plaintiffs were delayed in their exploitation by the conduct of the defendant Company. All these were matters for the jury and, although undoubtedly the sum is a large one, in my view this is not a case for sending the matter down for a new trial for the assessment of damages only. The jury were the proper constitutional tribunal to assess the damages and it is impossible to say they have gone so wrong that their assessment must be set aside. It is not a case merely for nominal, but for substantial damages of which the jury were the judges.

In the result, the judgment of the Court of Appeal should be varied, the appeal should be allowed and the appellant Company should have judgment for the sum of 35,000*l.* I should very much hope that, to save the expense of a protracted and long discussion, the parties might agree amongst themselves as to the costs. If they do not, I am for making the following order. The plaintiffs should have

the costs of the action except in so far as they have been increased by the claim under the licence agreement, which costs should be awarded to the defendants. The defendants should have the costs of the appeal to the Court of Appeal, except in so far as they were increased by their appeal against the 35,000*l.* verdict on the confidence case, which costs should be awarded to the plaintiffs; and in this House the plaintiffs should have the costs except in so far as they have been increased by the appeal against the licence agreement, which costs should be awarded to the defendants.

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I cannot part from this case without referring to the remarks made in the Court of Appeal upon the method in which it was conducted in the Court of first instance. The learned Master of the Rolls said: "There remains one feature of this case upon which, in association with my colleagues, I desire to make serious comment—that is the cross-examination to which the leading actors on either side, Mr. Lehwiss and Sir Herbert Austin, were subjected. Measured by the shorthand note, it appears that Mr. Lehwiss's examination occupied 80 pages; his cross-examination occupied 265. The examination of Sir Herbert Austin occupied 39 pages, and his cross-examination 148 pages. There is a tedious iteration in some of the questions asked, and prolonged emphasis is laid on some matters, trivial in relation to the main issues. Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion; and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness. We desire to say that in our opinion the cross-examination in the present case did not conform to the above conditions, and at times it failed to display that measure of courtesy to the witness which is by no means inconsistent with a skilful, yet powerful, cross-examination."

With that censure I agree, except that I cannot think it can be justly applied to the counsel who appeared on behalf

H. L. (E.) of the plaintiffs or to any of the counsel who appeared at the bar of your Lordships' House. It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of law. It is not sufficient for the due administration of justice to have a learned, patient and impartial judge. Equally with him, the solicitors who prepare the case and the counsel who present it to the Court are taking part in the great task of doing justice between man and man.

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LORD BLANESBURGH. My Lords, except only upon one question, I find myself in full accord with my noble and learned friend on the Woolsack in everything he has said. I have been privileged to read his judgment in print. Subject to that one reservation I would, if I may, without another word in support of them, associate myself with all its conclusions. As a result of these very little of the jury's original verdict remains in being. Their significant finding on the conspiracy issue against the respondents alone, to the exclusion of Mr. Watkins and his firm, did not survive the Court of Appeal. It was not revived in this House. Their findings on the licence agreement are now finally set aside. Their assessment of damages at the sum of 63,550*l.* for breach of that agreement shares, of course, the fate of the agreement itself. It may remain significant for illustrative purposes. But that is all. The verdict upon the confidence agreement stands. That my noble and learned friend leaves intact. It is there my difficulty arises. I regret that I cannot go so far. As in duty bound and with no reluctance I accept the finding that there was such an agreement and that it was broken by the respondents to the extent found by the jury. There was evidence to justify them in so finding. But their assessment of damages for that breach at 35,000*l.* is, in my

considered judgment, an assessment incapable of justification. It can, I believe, be shown affirmatively, and what follows is an attempt on my part to show, that, applying the language of Fitzgerald J., approved by Palles C.B., in *M'Grath v. Bourne* (1), no reasonable proportion exists between the assessment and the circumstances of the case. If that be so (it may be a large "if," I agree, but if it be so), then especially, in a case like this where the damages assessed are for breach of contract and not in tort, it will hardly, I take it, be gainsaid that in a Court of review, such an assessment will not be allowed to stand.

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My Lords, the verdict of the jury in question now was not a verdict at large. This assessment of damages was based upon their own answers to specific questions submitted to them. Its real meaning can only, I think, be fully appreciated if the range of these questions with the answers be kept clearly in view. The questions on this, as on all other issues, were agreed by counsel on both sides and accepted by the learned judge as the only questions upon which the jury's assistance was required. It would overburden a judgment like this again to set forth at length those now relevant. It will suffice to describe, as the result of both question and answer, the situation with reference to which in relation to the confidence agreement the jury were required to assess damages.

(a) There was nothing to be taken as confidential between the appellants and the respondents except in relation to the "plaintiffs' specification and drawings," i.e., their draft complete specification and drawings deposited at the Patent Office on August 2, 1928, and accepted with slight modification on November 22, 1929.

(b) The breach of confidence complained of and found consisted exclusively in the taking out by Sir Herbert Austin of the Letters Patent No. 320,486, applied for on September 8, 1928, and accepted on October 12, 1929.

(c) It was in respect of that breach and that breach only that the assessment of damages was called for.

(1) (1876) 1. R. 10 C. L. 160, 164.

H. L. (E.) And there was something more. There were two heads, and two only, under which the appellants were alleged to have been damaged by the respondents' breach: (a) they were thereby delayed in the exploitation of their construction: and (b) they were thereby prevented from entering into a formal licence agreement with the respondent Company. This second allegation in the amended statement of claim was, except for the addition of the word "formal," a survival of one in the original statement of claim in which the existence of a licence agreement was not alleged, and Romer L.J., I see, so construes the amended pleading as to exclude this second allegation from consideration in relation to the confidence agreement. But although its original application was to something quite different, the allegation appears to have been treated at the trial as applicable to a breach of the confidence agreement. And I will so regard it.

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The question therefore is whether an award of 35,000*l.* as damages under heads (a) and (b) for the only breach as alleged and found of the only confidence reposed in the respondents' also as found, can be justified? Does any reasonable proportion exist between that assessment and the circumstances of the case—to repeat the Irish judicial test?

There are two "circumstances of the case" which are important to be remembered now. The breach of confidence was in respect only of the terms of the appellants' British patent, which until that patent was accepted on November 22, 1929, had not been published to the world. The licence agreement was to be for an exclusive licence of that patent for its full term under minimum royalties but with no covenant on the part of the licensees either to work or develop the invention. The value to the appellants of such an agreement under which the whole beneficial interest in the patent would have passed to the respondents was hailed by Dr. Lehwiss himself in his letter to Mr. Jameau of September 3, 1928, as being 75,000*l.*—the amount of the minimum royalties extending over the whole sixteen years of the patent. The value of these royalties at the date of the writ was at the trial agreed at 39,900*l.* That is one circumstance. The second is that on

June 10, 1930, the appellants pressed upon the respondents for their acceptance a proposal to sell their whole patent rights for 1000*l.* a year over sixteen years, payments, that is to say, with a present value of probably not more than 11,000*l.* With these two circumstances remembered, each of the jury's assessments of damages asks for criticism—the first assessment, of course, being only now relevant as throwing some light on the second. But the facts are that while the whole present value to the appellants of the licence agreement on the terms that the whole beneficial interest in the patent rights had passed to the respondents was 39,900*l.*, the jury awarded to the appellants 63,550*l.* as damages for repudiation by the respondents of that contract, and on the footing that all the patent rights remained with the appellants; while they awarded to the appellants in respect of the breach of the confidence agreement the sum already stated of 35,000*l.*—which either by accident or design is seven-eighths of the value at the date of the writ of the minimum royalties payable under the licence agreement, i.e., 34,975*l.*, with 25*l.* added to make a round figure, and again on the terms that the patent rights remain with the appellants—the assessment being 24,000*l.* above the price asked by the appellants in June, 1930, for their entire interest in the patent.

But it is not necessary to rely upon such general considerations, significant of this jury's temper as they seem to be. It is safer to consider this present assessment in detail. It is one that can be tested.

And it is convenient to deal first with the second allegation already stated—namely, that as a result of the respondents' breach the appellants were delayed in the exploitation of their construction and were prevented from entering into a formal licence agreement with the respondent company. It is hardly, I think, open to doubt that the sum of 35,000*l.* at which the jury quantified the appellants' damages in respect of the confidence agreement resulted from their acceptance of the view that, owing to the taking out of the Austin letters patent, the appellants lost the chance they would otherwise have had of an acceptance by the respondent Company of a

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H. L. (E.) licence in the terms specified in the licence agreement. That
 1935 35,000*l.*, as the sum quantified, can be so explained, and is not
 MECHANICAL a mere coincidence, is a conclusion I could elaborate if it were
 AND necessary. But it is really unimportant whether the explan-
 GENERAL ation already offered of the jury's figure is more than a guess.
 INVENTIONS The real question is whether an award of damages on this head
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Owing possibly to some error in the shorthand note the learned judge's direction to the jury here is not quite clear. The passage is as follows at p. 233: "Sir Stafford [Cripps] tabulated his claims and one of the things he suggested was loss of a contract with Sir Herbert Austin. Well on this part of the case—I am not now talking about the licence at all—there is not any agreement by Sir Herbert to make a contract with the plaintiffs and Mr. Pritt is quite right in saying that you must not take that into consideration. Of course, if the plaintiffs had had a chance and assuming that they have lost that chance because in breach of contract the defendants have taken it from them, why then it may be that if that chance had not been taken away the public demand for these cars might have become so great; it may be that Sir Herbert or his company would have been driven to using them. You must take that into consideration."

Now, here the learned judge does seem to direct the jury that loss resulting from Sir Herbert Austin's refusal to enter into an agreement with the appellants must not be considered, but if his further observations amounted to a direction to them to take this so-called "chance" into consideration it was, I suggest to your Lordships, a serious misdirection. For it is, I submit, clear that the taking out by Sir Herbert of his patent could in reason have had no connection with or influence upon the question whether or not the respondents should take a licence from the appellants. It is not only that there is no evidence, so far as I can find, that the existence of his own patent influenced Sir Herbert Austin at all in his decision that his Company should not take a licence. His own evidence was that he abandoned the whole idea of the appellants' construction because in his view it was not wanted in the

market and was in itself unsatisfactory. But apart from all evidence does it not stand to reason that the taking out of this patent of his own could have had no influence upon his decision? He did not by taking out a patent subsequent in date to the appellants' annex the appellants' construction or any part of it or strengthen his or his Company's position as against the appellants in any way. His patent in this respect, even if it made claims included in the appellants' specification, gave him as against them no rights which he did not possess without one. His taking out of his patent made a licence from the appellants neither more nor less desirable for the respondent Company from a business point of view than it had been before. Apart from the extravagance of such a sum as 35,000*l.* being the measure of damages on this head—a subject to which I have already alluded—I suggest to your Lordships that an award of any damages at all on this score is quite inadmissible. In this result I find myself in agreement with the Master of the Rolls. Nor can I find any answer to Romer L.J. when he says: "Neither the defendant Austin nor the defendant Company can be made liable to the plaintiffs in damages because the Company refused to enter into a licence agreement with the plaintiffs, whatever may have been the reason for that refusal."

But, my Lords, although this claim of the appellants may well have been the real basis of the jury's assessment, little was made of it in this House. Here the assessment was mainly sought to be justified on the first head pleaded—that of delay. The registration of the Austin patent on the file of the Patent Office, it was said, was a complete bar, while it continued, to the exploitation of the appellants' construction, and by the time that patent was removed every possibility of marketing the appellants' monopoly had disappeared. An award of 35,000*l.* on that head could be justified: for, as a result of the appellants' delay in exploitation, due to the registration of Sir Herbert's patent, the appellants' patent had become worthless. It will be seen that this claim is alternative to the first. The two claims are not concurrent.

Now, my Lords, there are many answers to these contentions,

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H. L. (E.) if in truth they were ever even considered by the jury, which I gravely doubt.

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First of all the assertion that his patent was, even at the time of the trial, worthless was one that Dr. Lehwiss would not have permitted himself to make. But the final answer is that if it had become worthless and if its worthlessness was due to delay in exploitation, that delay was in no way attributable to the registration of the Austin patent or to any interference with the appellants' activities by reason of its existence. On December 10, 1929, so soon as Mr. Watkins heard of the acceptance of the appellants' patent he intimated Sir Herbert's intention to withdraw all competing claims from his patent accepted a month or so earlier. On January 10, 1931, Sir Herbert consented to a revocation of his patent: but this consent was not accepted by the appellants, as they claimed to have the patent registered in their name, a claim which failed, but which delayed the formal revocation of the patent until July, 1931. It is difficult to suppose in these circumstances that the appellants were ever delayed in the exploitation of their patent by the presence on the register of the respondent's patent, one subsequent in date, and with all competing claims withdrawn. Some reason for their failure to exploit their system which, to the great surprise of the learned judge, Dr. Lehwiss stated continued up to the trial in November, 1933, must be looked for, and I suggest to your Lordships that, if it did not result from doubts as to its monopoly value, it was due to the fact that the appellants, so soon as they realized that the respondents had abandoned the projected licence agreement, set themselves by negotiations to induce them to enter into a fresh agreement, even to purchase their patent outright. They always expected, said Mr. Negon, to come to such an arrangement. But to be able to do so it was essential that they should retain their patent rights intact so that they might be included either in a sale or in a licence to the respondents could such be arranged. I have been at a loss to understand, as I have said, how failure to negotiate successfully for a sale or licence to the respondents could be attributable to the existence of Sir Herbert's patent: I am at a loss here to understand how any

damage can be claimed to have resulted from the appellants' inability to negotiate for sale in another direction when that inability necessarily resulted from their abortive negotiations with the respondents by which they hoped to benefit.

It was asked whether a plaintiff was to be prejudiced by an attempt to settle. Surely not. But if he considers it to be to his interest to make that attempt and, as a term incident to its success, it is necessary that he do not offer the subject of negotiation elsewhere, a claim for damages for any loss thereby sustained on that score is like a gambler seeking a return of his stake after he has lost his bet. I suggest to your Lordships that no kind of damage on this head traceable to the existence of the Austin patent was proved—certainly none that had any relation to such a sum as 35,000*l*.

My Lords, the jury in this case were clearly of opinion that the appellants had been shabbily treated by Sir Herbert Austin; they doubtless enjoyed his polite but severe cross-examination, just as much as they resented the attack on the veracity of Dr. Lehwiss made also in cross-examination; they resented such a cross-examination at the instance of the respondents. They were warned by the learned judge not to punish the respondents. Their verdict in nearly every part of it indicates in my eyes that the warning was unheeded. The exoneration from the charge of conspiracy of Mr. Watkins and the impossible finding of a conspiracy between Sir Herbert and himself under the alias of his company, and the two assessments of damage with no feature in common except the magnitude of their amount, all indicate this to me.

I hold no brief for either Sir Herbert or his Company in this matter. Had I been sitting in a Court of honour I would not in relation to his conduct have discriminated too closely between the *mémoire descriptif* with Fig. 1 and the draft complete specification. I would have seen in each and not in one more than in the other an obligation in honour on the part of Sir Herbert not to utilize for his own purposes any information thereby disclosed to him for the first time, without at least informing the appellants of his intention so to do. But the jury were not sitting as a Court of honour. The

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punishment of the respondents for any offence was beyond their province. The endowment of the appellants out of the proceeds was even more indefensible. The proper compensation of the appellants for any legal wrong alleged and proved to have been done them by the respondents was their only duty. And I conceive it to be one of the most important functions of the Court in any case in which it finds that a jury has yielded to the besetting weakness, disclosed, as I think, here, to correct it. If the Court were to become hesitant in the exercise of that function, a jury in civil cases would soon become a tribunal for the punishment of defendants for other than legal wrongs committed or for the denial to plaintiffs of their legal rights and all according to the length of its own foot, instead of being, as in this case it alone was, a tribunal for compensating the appellants for legal wrong suffered by them at the hands of the respondents.

I will close with the citation of an authoritative statement of the function of the Court in cases of this kind which is to be found in Vaughan Williams L.J.'s judgment in *Johnston v. Great Western Ry. Co.* (1): "If the Court, from the circumstances of the case and the amount of the damages, can draw the inference that the jury must have applied a wrong measure of damage in contravention of the direction of the judge, the Court may order a new trial, although it is not in a position to say that the mere quantum of excess is so large that no reasonable jury could have arrived at such an amount." And, my Lords, I have reached the conclusion, satisfactory, at all events, to my own mind, that the inference referred to by the Lord Justice is, in this case, inevitable.

This assessment should, therefore, I think beset aside as demonstrably excessive and unreasonable. But I am not prepared to say, as did the Court of Appeal, that no damage at all has been proved. I am not, therefore, ready to support their order for nominal damages only. But that does not mean that the issues on the confidence agreement must all be sent for a new trial. It only means that following the precedent set by this House in *Tolley v. J. S. Fry & Sons, Ltd.* (2), the new trial will be one confined

(1) [1904] 2 K. B. 250, 256.

(2) [1931] A. C. 333.

strictly in its scope to an assessment of damages on this head. Fortunately, this should be a simple inquiry enough, one that need not be either heated or prolonged. I note also that both the appellants and the respondents, in the circumstances which I find existing, unite in proposing the adoption of that course. The appellants make the suggestion in their printed Case (para. 38 (f)) and the respondents in theirs (para. 142).

LORD ATKIN. My Lords, I have had the advantage of reading the opinion read by the Lord Chancellor and the opinion about to be read by my noble and learned friend Lord Wright, and as I agree with their reasoning and conclusions I should have added nothing were it not that we are differing in one respect from the decision of the Court of Appeal.

On the important question as to the duty of an appellate Court when dealing with the verdict of a jury I desire to endorse in every respect the detailed exposition contained in the opinion of Lord Wright. I would only desire to add that once it has been decided that a civil case has to be tried by a jury, that tribunal and that tribunal alone is the judge of fact; and no appellate Court can substitute its own findings for those of the lawful tribunal. An appellate Court has a revising function to see first whether there is any evidence in support of the issue found by the jury; and secondly whether the verdict can stand having regard to the considerations which I will not restate lest I should appear to seek to vary the expressions in the two opinions I have mentioned. If in the latter kind of dispute it is obvious that no verdict for the plaintiff on all the available evidence could be supported, the Court may save the waste of time in ordering a new trial which could have only one possible result by ordering the verdict and judgment to be entered for the defendant. I do not think that the rules of Court go beyond that: and if they did I should doubt whether they would be within the rule-making power.

In the present case as far as the licence agreement is concerned it appears to me that the finding of the jury is inconsistent with and impossible to reconcile with ascertained fact—namely, the contemporaneous correspondence, and therefore cannot stand.

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H. L. (E.) I do not think that this decision should throw any doubt on the correctness of the finding of the jury on the other facts of the case. It is plain that they accepted Dr. Lehwiss as in substance a witness of truth. His bona fides in maintaining that the parties had come to an agreement on important points at the interview on September 3 was made manifest by the terms of a contemporaneous letter to a business associate in Paris, rightly admitted in the circumstances by the trial judge. But it is plain from the correspondence that Dr. Lehwiss did not in fact consider that the measure of agreement, large as it was, which the parties had reached in conversation, was sufficient in itself to constitute a contract by which the parties were bound. The documents which are referred to by the Lord Chancellor and Lord Wright make it clear that he did not consider the Austin Company bound. In these circumstances the letters plainly show that there was no contract and the jury's verdict that there was cannot stand. It is the kind of evidence in respect of which any jury is at a disadvantage in a complicated case involving many disputed allegations of fact and a correspondence extending over many months. It can hardly be said that the jury lose sight of the documents, for they barely see them. It is not surprising in the circumstances that even a competent special jury may have failed to notice the compelling significance of the written word.

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On the other branch of the case I can find no facts uncontroverted or uncontrovertible which justify an appellate Court in interfering with the verdict. There was ample evidence to support the finding of contract and breach. I am inclined to think that too much importance was attached to the supposed intrinsic confidential nature of the information disclosed. It is quite sufficient to support the contract averred that the terms upon which the information was disclosed were that it was to be used for a particular purpose only. The giving of the information is ample consideration, and use for any other purpose would be a breach. The analogy of a contract of bailment I think supports this view. The confidential nature of the information, the fact that it was

not known and could not be known to members of the public, would in this view be relevant to damages rather than to formation of the contract. But in any case here there was ample evidence upon which the jury could find both the contract put to them and the breach, a breach instantaneous, surreptitious and made for the advantage of the defendant, who was specially qualified to form an opinion as to the value of the information which he was wrongfully using. I find it impossible to agree that the damages which flowed from the breach of the contract were only nominal. The members of the Court of Appeal, with respect, attached too much importance to the isolated expressions of Dr. Lehwiss that he considered himself bound by the licence agreement and on that account refrained from exploiting his patent. It is unstable ground in view of the fact that the Court of Appeal also took the view, shared by your Lordships, that in fact Dr. Lehwiss did not consider himself bound, and that for that reason the verdict on the licence agreement must be set aside. But in fact Dr. Lehwiss could very properly treat himself as bound to the Austin Company for commercial purposes by a very close negotiation intentionally long drawn out, while all the time the defendant Austin was secretly busy availing himself of the plaintiffs' information in obtaining patents for himself in England and all over the globe. The jury were entitled to find a substantial period of time after discovery of the breach in which Dr. Lehwiss was entitled to hold his hand. There was also evidence that the Lehwiss invention was of value, that the plaintiff lost a market which would have been available for him at the time, and that the rewards of a successful invention of the type would be very great. It was pointed out that in one year the output of the Austin factories alone was about 60,000 saloon cars, out of which about 49,000 were fitted with what was then a competing sunshine roof. I have not to consider whether I myself would have found so large a sum. The amount of damages was a matter peculiarly fit for determination by a jury and I see no reason to set their decision aside. I also wish to affirm my agreement with the concluding remarks of

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H. L. (E.) the Lord Chancellor, and particularly with his statement that
 1935 no censure was deserved in any respect by counsel who appeared
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 AND proposed by the Lord Chancellor.
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LORD MACMILLAN. My Lords, I have had the privilege of reading in print the opinions delivered by the Lord Chancellor and by my noble and learned friend Lord Atkin, and also the opinion about to be delivered by my noble and learned friend Lord Wright. I have only to say that I find myself in entire agreement with them.

LORD WRIGHT. My Lords, I have had an opportunity of considering in print the opinion which has just been delivered by my noble and learned friend on the Woolsack. I am in complete agreement with everything that is said in that opinion, and merely proceed to add a few observations because of the important questions raised in regard to the functions of an appellate Court when dealing with the verdict of a jury.

I concur with the Court of Appeal in the conclusion that the jury's verdict in respect of what has just been described as "the licence agreement" should be set aside. I do so for the reasons set out by the Lord Chancellor, which seem to me to bring the case within the language used by Lord Atkinson in *Banbury v. Bank of Montreal* (1) in reference to *Allcock v. Hall*. (2) What Lord Atkinson said was that in that case "on an application for a new trial on the ground that the verdict was against the weight of evidence the Court of Appeal, applying the principle laid down in *Metropolitan Ry. Co. v. Wright* (3), set aside the verdict, holding that it was utterly irreconcilable with the evidence in the case when reasonably considered." Then (4) he describes another case in which the Court of Appeal set aside the verdict of a jury on the ground that the verdict was against the weight of evidence as being a case where the Court acted on the basis that it was one where there was conflicting evidence but an overwhelming

(1) [1918] A. C. 626, 678.

(3) 11 App. Cas. 152.

(2) [1891] 1 Q. B. 444.

(4) [1918] A. C. 679.

balance of it on one side. That was *Millar v. Toulmin* (1), where, however, on appeal this House took a different view and restored the verdict of the jury: *Toulmin v. Millar*. (2) In the present case it is clear that the jury believed the evidence given by Dr. Lehwiss to the effect that an agreement had been orally concluded: there was accordingly evidence on which they could so find. Indeed, as the Lord Chancellor has explained, it seems clear that Dr. Lehwiss himself honestly believed that he had made the agreement, though no doubt at certain periods he thought the contrary. The Lord Chancellor has pointed out how easy it might be for even a careful jury to give undue weight to that evidence and forget that it was completely irreconcilable with the totality of the evidence in the case, in particular with the conduct and statements of Dr. Lehwiss himself. His conduct was in truth quite inconsistent, on a careful contemplation of the documents, with there having been the agreement which he subsequently alleged and sought to establish at the trial: equally inconsistent were his letters, to some of which the Lord Chancellor has referred, and if I may take one further instance of inconsistency, I may refer to the statutory declaration which Dr. Lehwiss made in the proceedings for the revocation of Sir Herbert Austin's patent. In that declaration he stated: "On September 3, 1928"—the date on which the oral agreement was afterwards alleged to have been made—"the draft agreement was discussed with Sir Herbert Austin and generally agreed upon." It is on the ground of this inherent inconsistency of Dr. Lehwiss' own story, when the totality of the material, oral and documentary, is considered, that I think the verdict of the jury on this matter cannot stand. I do not so decide simply because I myself should have come to a different conclusion, or on the ground that the verdict of the jury is one which, on a mere balance of evidence, does not appear to me to be reasonable. The appellate Court is never the judge of fact in a case where the constitutional judge of fact is the jury.

For the appellate Court to set aside the verdict of a jury as

(1) (1886) 17 Q. B. D. 603.

(2) (1887) 12 App. Cas. 746.

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being against the weight of evidence, merely because the Court does not agree with it, would, in my judgment, be to usurp the functions of the jury and to substitute their own opinion for that of the jury : that would be quite wrong. Much more is necessary in order to justify the setting aside of a jury's verdict where there is some evidence to support it. No doubt the test can be roughly described as being whether the verdict of the jury was reasonable, but what is meant by reasonable in this connection, must be carefully defined. I shall not seek to make an anthology of the glosses in the authorities upon the word "reasonable" in order to warn appellate Courts that they must not act merely on what appears to them, on a reading of the shorthand notes, to be a conclusion more reasonable than that arrived at by the jury. The right and duty of the Court to control the verdicts of juries was recognized in early days : thus in 1655 in *Wood v. Gunston* (1) Glyn C.J. said : " It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary discretion, and it is frequent in our books for the Court to take notice of miscarriages of juries, and to grant new tryals upon them." And in *Baker v. Dixie* (2) it was said : " New trials came in the room only of attaints, as a more expeditious and easy remedy."

The objection in *Wood v. Gunston* (1) was that the damages were excessive, and a new trial was there ordered. The use of the phrase " miscarriage of juries " is significant. It indicates what there must be to justify the appellate Court in interfering with or controlling the verdicts of juries. Since then many cases have been reported on these matters, but I think most useful guidance to help the appellate Court is to be found in *Metropolitan Ry. Co. v. Wright*. (3) Lord FitzGerald (4) states the question to be " whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust " : and he adds that the onus is on the appellants to establish that this condition is fulfilled. But the most illuminating statement is, I think, to be found in the

(1) (1655) Style, 466.

(2) (1736) Stra. 1051.

(3) 11 App. Cas. 152.

(4) Ibid. 155.

observations of Lord Halsbury. (1) He refers to the case of *Solomon v. Bitton* (2), where the question according to the report (the correctness of which was afterwards disputed in *Webster v. Friedeberg* (3)) was stated to be "whether the verdict was such as reasonable men ought not to have come to." Lord Halsbury said (1) that was an erroneous statement of the principle. "If a Court,—" he proceeded, "not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all,—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. . . . I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them ; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word ' might ' were substituted for ' ought to ' in *Solomon v. Bitton* (2) I think the principle would be accurately stated."

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Lord Halsbury in these valuable observations is, I think, going back to the test applied in *Wood v. Gunston* (4), which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

In this case, on these principles and for the reasons which I have indicated, but which are more fully set out in the speech of the Lord Chancellor, I think the appellants in the Court of Appeal (the respondents in this House) satisfied the onus which always rests on appellants who seek to set aside the verdict of

(1) 11 App. Cas. 156.

(2) (1881) 8 Q. B. D. 176.

(3) (1886) 17 Q. B. D. 736.

(4) (1655) Style, 466.

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a jury as being against the weight of evidence. The balance of the evidence was overwhelmingly in their favour and the totality of the evidence of Dr. Lehweß, oral and documentary, was irreconcilable with that part of his evidence which asserted the oral agreement. The verdict was one which the jury, however comprehensible in all the circumstances their decision might be, were not competent to find, that is, "might" not find, on the evidence.

On the second and alternative issue in the case, what has conveniently been called "the confidence agreement," I, like the Lord Chancellor, concur with the conclusions of the Court of Appeal until I come to the question of damages. On this question it is all-important to note carefully the exact terms of the answer of the jury to Question 7; by that answer the jury found that the information was used in breach of the confidence agreement by the defendants for the purpose of securing for the defendant Austin patent protection in respect of the plaintiff's construction or some substantial part thereof by taking out Letters Patent No. 320486. Apart from any question of damages it is immaterial how or why the respondents committed a breach of that agreement, but in relation to damages the essence of that finding is that the abuse of the confidential information which constituted the breach was not by inadvertence but was deliberate, and with the object of securing a patent covering substantially the plaintiff's construction: that finding involves an intention on the part of the respondents to do what must necessarily prejudice the appellants in their endeavour to exploit their own patent for their profit. It seems on the evidence to be established that what the respondents did had that effect. The whole evidence on this issue has been examined before your Lordships and is summarized by the Lord Chancellor. It is ample to support the finding of the jury that there was this disingenuous design on the part of the respondents thus to benefit themselves at the expense of the appellants and by an abuse of confidence: it is clear that all this was concealed from the appellants, who were systematically induced to think that the respondents were contemplating the purchase from the appellants of a

licence under the appellant's patent, at least up to December, 1929. When they discovered what had been going on, the appellants were placed in a difficult position. Substantial damage to the appellants must, it seems, have been inevitable. The jury were, as the Lord Chancellor explains, properly directed and had all the facts fully before them. In considering their award on damages, that view of the evidence most favourable to their finding must be taken, not the view most adverse to it, if or where two views are competent. It is true that the damages awarded ran into big figures, but damages cannot be treated as excessive merely because they are large. Excess implies some standard which has been exceeded. It is true that the damages could not be arrived at otherwise than by estimate and conjecture: but that was because the respondents' own conduct had made it impossible to put to practical test during the period of delay complained of, the money value of the appellant's invention. As to definite figures, the jury had before them, besides the other considerations adverted to by the Lord Chancellor, the fact that in a single year the respondents had paid (to another concern) 5000*l.* in royalties under a non-exclusive licence to use on their cars a type of "sunshine" roof competing with that patented by the appellants.

I cannot agree with the Court of Appeal that the damages were nominal. Their reasoning is, in my opinion, on lines too narrow to accord with the realities of the situation. My only doubt has been whether the amount found by the jury was so large as to make it necessary after three prolonged hearings to order yet a further trial, which would in that case be limited to the question of damages. I have had some difficulty on this matter. I do not in the least say that I should have awarded the same amount myself. But that is not the relevant consideration. Most of the reported cases on the question of excessive damages are naturally cases of tort: in contract the damages are generally capable of more or less precise ascertainment, though it sometimes happens—as here—that they must be matter of conjecture. But in general in contract a new trial

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H. L. (E.) is ordered, if at all, because of some error in law. But where there is no error in law the principles are well stated by Lord Esher in *Praed v. Graham* (1), where he said "the rule of conduct" for the appellate Court when considering whether a verdict should be set aside on the ground that the damages are excessive, "is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence." Lord Esher adds that the Court cannot set aside the verdict merely because it is larger than they themselves would have given, but only if "having regard to all the circumstances of the case, the damages are so excessive that no twelve men could reasonably have given them." He treats that statement as equivalent to the definition given by Fitzgerald J. and approved by Palles C.B. in *M'Grath v. Bourne* (2), that to justify setting aside the verdict on the ground of excessive damages "the amount should be such that no reasonable proportion existed between it and the circumstances of the case." Lord Esher's statement of principle was approved by another master of the common law, Vaughan Williams L.J., in *Johnston v. Great Western Ry. Co.* (3)

These tests seem to me to correspond to the tests which I have sought to apply in considering the verdict of the jury on the licence agreement. But whereas in the former matter I find that the verdict was one the jury could not "reasonably" find because it involved an irreconcilability or want of proportion between it and the whole circumstances of the case, I do not find in the verdict on damages any such irreconcilability or want of proportion between these damages and the whole circumstances of the case. On the question of damages the respondents have not satisfied me that the verdict was one which was "unreasonable" in the sense that the jury "might" not come to it, or one which was against the overwhelming balance of the evidence. Nor can I find that the jury were partial or perverse: and again I should desire to quote and apply here the observation which Viscount

(1) 24 Q. B. D. 53, 55.

(2) I. R. 10 C. L. 160, 164.

(3) [1904] 2 K. B. 250.

Hailsham L.C. made in *Tolley v. J. S. Fry & Sons, Ltd.* (1), in reference to that case: "I cannot see in the facts of this case any ground for saying that the amount of the damages awarded is so excessive as to warrant the inference that the jury took a biased or mistaken view of the whole case."

Thus applying *mutatis mutandis* the same principle to the verdict of the jury on the question of damages as I applied on the question of the licence agreement, I conclude that the verdict on damages should not be interfered with.

I may add that the order of the Court of Appeal on the issue of the licence agreement, not merely setting aside the verdict of the jury, but ordering judgment to be entered upon it, was in my opinion justified under Order LVIII., r. 4. That course was followed in *Banbury v. Bank of Montreal* (2), where the verdict of the jury for the plaintiff being set aside, judgment was entered by the appellate Court for the defendants. That was a case where the verdict was set aside on the ground that there was no evidence at all to justify a verdict for the plaintiff, but I think it is clear that under r. 4 the same course is competent where the verdict is set aside as being against the weight of evidence: in this respect no distinction can be drawn between the two grounds for setting aside a verdict. That was the opinion of the Court of Appeal in *Allcock v. Hall* (3), where judgment was entered for the defendant, not because there was no evidence at all to support the verdict, but because the verdict was against the weight of the evidence. In *Millar v. Toulmin* (4) the Court of Appeal had gone further and entered judgment for the plaintiff after setting aside the verdict as being against the weight of the evidence. When this House reversed that judgment in *Toulmin v. Millar* (5) Lord Halsbury expressed a doubt whether r. 4 gives jurisdiction to the Court of Appeal to find a verdict for themselves. I should venture to think that for the Court so to do would amount, not to controlling, but superseding the jury and exercising the function of affirmatively finding

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(1) [1931] A. C. 333, 341.

(3) [1891] 1 Q. B. 444.

(2) [1918] A. C. 626.

(4) 17 Q. B. D. 603.

(5) 12 App. Cas. 746.

H. L. (E.) the facts. Apart from *Millar v. Toulmin* (1) I know of no case where this course has been taken. I agree with the observations on this point of my noble and learned friend Lord Atkin. But with him I think it is clear that the order of the Court of Appeal in the present case so far as it deals with the issue under the licence agreement is justified under Order LVIII., r. 4.

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On the whole case I desire to concur with the motion proposed by the Lord Chancellor.

Ordered and adjudged that the order of the Court of Appeal in part complained of in the original and cross-appeals be varied, and that on the agreement referred to in questions 6 and 7 submitted to the jury judgment be entered for the appellants for the sum of 35,000l. and that the said order, except so far as aforesaid, be affirmed: Ordered that the respondents in the original appeal do pay to the appellants in the original appeal, the costs of action in the King's Bench Division of the High Court of Justice, except so far as the said costs have been increased by the claim under the alleged agreement to take a licence, and by the claim in respect of the alleged conspiracy and by the claim for special damage, and that the appellants in the original appeal do pay to the respondents in the original appeal the costs in the King's Bench Division of the High Court of Justice, in respect of the claim under the said alleged agreement and the claim in respect of the said alleged conspiracy and the claim for the said special damage: Further ordered, that the appellants in the original appeal do pay to the respondents in the original appeal, the costs in the Court of Appeal, except so

(1) 17 Q. B. D. 603.

far as the said costs were increased by the appeal against the verdict of 35,000l. on the agreement referred to in questions 6 and 7, and that the respondents in the original appeal do pay, or cause to be paid, to the appellants in the original appeal, the costs of the appeal in the Court of Appeal, in respect of the appeal against the said verdict : Further ordered that the respondents in the original appeal, do pay to the appellants in the original appeal, the costs in respect of the original appeal to this House, except in so far as the said costs have been increased by the appeal against the said alleged agreement to take a licence, and that the appellants in the original appeal do pay, or cause to be paid, to the respondents in the original appeal, the costs in the original appeal to this House in respect of the said alleged agreement : Further ordered, that the said cross-appeal, be, and the same is hereby, dismissed this House : Further ordered, that the appellants in the cross-appeal do pay to the respondents in the cross-appeal, the costs in respect of the said cross-appeal.

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Lords' Journals, March 14, 1935.

Solicitors for appellants : *Roche, Son & Neale.*

Solicitors for respondents : *Sharpe, Pritchard & Co., for Ryland, Martineau & Co., Birmingham.*

Applied. Re HATCH (dec'd.). [1948]
2 All E.R. 288.

Distinguished. Re BRASSEY'S DEED
TRUSTS. [1951] 2 All E.R. 353.

[HOUSE OF LORDS.]

H. L. (E.)* THE ATTORNEY-GENERAL (ON BEHALF) } APPELLANT;
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March 15. AND

LLOYDS BANK, LIMITED RESPONDENTS.

Settlement—Trust fund—Power of Appointment—Absolute Gift—Trust to accumulate Income—Defeasible Interest—Property passing on death—Interest arising on death of deceased—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1; s. 2, sub-s. 1 (d).

By a deed of settlement the settlor caused to be issued to or transferred into the names of trustees certain shares in a company in trust for all such one or more of her children or remoter issue, or the husbands or wives of the children or remoter issue, as she, the settlor, should by deed revocable or irrevocable or by will appoint, and until and in default of appointment upon trust to divide the trust fund into three equal shares and appropriate one share to each of her three named children, but so that the three shares should be retained by the trustees upon the trusts therein declared.

By a deed of appointment the settlor directed the trustees of the settlement to hold the trust fund in trust during her life to accumulate the income and after her death to stand possessed of the trust fund and accumulations in trust for her three named children in equal shares, but so that the share which after her death was to be held for each of the said three children should not vest absolutely, but should be retained by the trustees upon trust during the life of each child to pay to him or her the income of his or her share and after the death of such child to hold that child's share in trust for the children or remoter issue of that child as he or she should appoint, and in default of such appointment in trust for all or any of the children of that child who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry if more than one in equal shares. There followed a hotchpot clause, and an accruer clause in case the trusts declared concerning the share of any child should fail. Finally the deed reserved to the settlor a power of revocation by deed or will. The settlor died without having revoked the appointment. She left her surviving the three children unmarried:—

Held, that the rule in *Lassence v. Tierney* (1849) 1 Mac. & G. 551, applied to the settlement; that under it the three children took absolute and immediate interests in the trust fund (though

* *Present*: LORD ATKIN, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

liable to defeasance) and that nothing passed to them under it on the death of the settlor within the meaning of s. 1 of the Finance Act, 1894. H. L. (E.)

Held, also, that the life interest of each child was deemed to be property passing on the death of the settlor within the meaning of s. 2, sub-s. 1 (d), of the Act, and the duty thereunder was leviable on the excess, if any, of the value of the expectant life interest of each child after the death of the settlor over its previous value.

Adamson v. Attorney-General [1935] A. C. 257, explained and followed.

Orders of the Court of Appeal affirmed.

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APPEAL from orders of the Court of Appeal dated respectively November 28, 1933, and May 1, 1934, affirming, with a variation, an order of Finlay J. dated July 1, 1933. By the orders appealed from it was declared that upon the death of Josephine Lawrence Butler estate duty did not become payable under s. 1 of the Finance Act, 1894 (1), in respect of the principal value of a certain settled fund hereinafter more particularly described; but that the beneficial life interest of each of three beneficiaries in the fund, to the extent to which the principal value of that interest at the death of the said Josephine Lawrence Butler, the settlor, exceeded the actual value of that interest before the death, was an interest accruing or arising on the death, and was therefore to be deemed property passing on the death in accordance with s. 2, sub-s. 1 (d), and subject to estate duty at the appropriate rate on the principal value of the excess.

By a deed of settlement dated November 20, 1925, and

(1) By s. 1 of the Finance Act, 1894: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled which passes on the death of such person a duty, called estate duty, at the graduated rates hereinafter mentioned."

passing on the death of the deceased shall be deemed to include the property following, that is to say:—

"(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

By s. 2, sub-s. 1: "Property

H. L. (E.) made between the said Josephine Lawrence Butler, hereinafter called the deceased, of the one part and Lloyds Bank Ltd., hereinafter called the trustees, of the other part, after reciting that the deceased had caused to be registered in the name of a nominee of the trustees 20,000 fully paid deferred shares of 10*l.* each in Butler Estates Co., Ltd., with a view to their being held upon trust for the benefit of the children and remoter issue of the deceased, it was thereby declared and agreed that the trustees should stand possessed of the shares and the investments from time to time representing them (thereinafter called "the trust fund") in trust for all such one or more of the children, or remoter issue of the deceased, or the husbands or wives of such children or remoter issue, in such shares and with such trusts for their advancement and in such manner in all respects as the deceased should from time to time by deed revocable or irrevocable or by will or codicil appoint; and until and in default of and subject to any such appointment upon trust to divide the trust fund into three equal shares and appropriate one share to each of her three named children but so that the three shares should be retained by the trustees upon trust to apply the income for the maintenance, education and benefit of each child until twenty-one if a son and twenty-one or marriage if a daughter, and to accumulate the surplus of the income in augmentation, and to follow the destination, of the share from which the increase proceeded, and to pay the income of each share to each child during the child's life and after the child's death in trust for the children or remoter issue of the child as the child should appoint and in default of appointment as therein provided.

By a deed of appointment dated September 26, 1928, and made between the deceased of the one part and the trustees of the other part, the deceased in exercise of the power given her by the settlement of November 20, 1925, appointed that the trustees should stand possessed of the trust fund upon trust during the life of the deceased to accumulate the yearly income thereof at compound interest as an addition to capital and after her death in trust for her three said children Vera

Lawrence Butler, Patience Mourilyan Butler and Francis Charles Joseph Butler in equal shares, but so that the trustees should retain the said shares and hold the share of each child upon trust to pay the income to such child during his or her life, and after the death of such child in trust for the children or remoter issue of such child as such child should appoint, with a provision in default of appointment and a provision for the accruer of any share in respect of which the above mentioned trusts should fail.

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The deed of appointment also contained the following proviso: "Provided always that the said Josephine Lawrence Butler," the deceased, "may at any time or times during her life by any deed or deeds revocable or irrevocable or by will or codicil wholly or partially revoke the appointment hereinbefore contained and by the same or any other like instrument appoint and declare any new or other trusts or provisions concerning the trust fund and premises or any part thereof, which may or would have been authorized by the power by the said settlement given to her in that behalf as aforesaid."

In pursuance of the direction contained in the deed of appointment of September 26, 1928, the trustees accumulated all dividends declared in respect of the said shares during the period between September 26, 1928, and the death of the deceased, and the accumulations form an addition to the capital of the trust fund. At the death of the deceased the accumulations were represented by 6450 further deferred shares of 10*l.* each in the above mentioned company and a loan of 365*l.* to the company with interest thereon.

The deceased died on October 15, 1930, without having exercised the power reserved to her by the deed of appointment of September 26, 1928, to revoke the appointment and declare new trusts concerning the trust fund. She left her surviving the three children above mentioned. None of the three children had been married.

The Attorney-General filed an information against the trustees claiming that estate duty at the appropriate rate became payable (*a*) under s. 1 of the Finance Act, 1894, in

H. L. (E.) respect of the principal value of the trust fund, including
 1935 the accumulations, on the footing that the property was
 THE settled property passing to the tenants for life on the death
 ATTORNEY- of the deceased, or (b) under s. 2, sub-s. 1 (d), of the said
 GENERAL Act in respect of the life interests of the children as being
 v. interests "provided by the deceased" and "arising on the death
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The information was heard by Finlay J., who held that upon the death of the deceased estate duty did not become payable under s. 1, but that estate duty did become payable at the appropriate rate under s. 2, sub-s. 1 (d), in respect of the life interests of the three children.

The Attorney-General appealed from the first part of the order. The trustees by special leave appealed against the second part of the order on the ground that the subject matter of valuation under s. 2, sub-s. 1 (d), was not the life interest which fell into possession but the value of the life interest less the value of the defeasible reversionary interest of the tenant for life during the life of the deceased. On November 28, 1933, the appeal of the Attorney-General was dismissed; on May 1, 1934, the appeal of the trustees was allowed, the Court of Appeal (Lord Hanworth M.R., and Slesser and Romer L.JJ.) being of opinion that there was no relevant distinction between this case and *Adamson v. Attorney-General*. (1)

The Attorney-General appealed to this House against both the orders of the Court of Appeal.

Feb. 28. *Sir Thomas Inskip A.-G.* and *J. H. Stamp* for the Crown. The question in this appeal is whether the case falls within the principle of *Adamson v. Attorney-General*. (1) The two cases are distinguishable. In *Adamson v. Attorney-General* (1) nothing passed under s. 1 of the Finance Act, 1894. The interests of the children of the deceased were immediate vested interests. The only thing that happened on the death in that case was that the vested interests which up to that time were defeasible became indefeasible; that

alteration in the character of the interests was held not to be a passing of property. In the present case the interests of the three children were during the life of the deceased entirely reversionary; the income of the trust fund was to be accumulated during the life of the deceased and after her death the share of each child was not to vest absolutely but was to be held during the life of each child upon trust to pay the income to him or her. Until the death of the deceased the children had no interest in the fund, the income of which was being accumulated to increase the capital for the benefit of her grandchildren. Upon her death the life interests of the children arose for the first time. When that happened there was a passing of property, but not before. Therefore estate duty became payable under s. 1 of the Finance Act, 1894.

If the property did not pass within the meaning of s. 1, the value on the death of the deceased of the indefeasible interests of the children over and above the value of their former defeasible interests is to be deemed to have passed under s. 2, sub-s. 1 (d), of the Act.

Wilfrid Greene K.C., Raymond W. Needham K.C. and P. M. Walters for the respondents. On September 26, 1928, the date of the deed of appointment, the three children took absolute interests: *Lassence v. Tierney* (1), approved in this House in *Hancock v. Watson* (2); *Rucker v. Scholefield* (3); *In re Marshall* (4), distinguishing *In re Payne* (5); *Donaldson's Trustees v. Donaldson*. (6) Assuming that those interests might have been defeated by a revocation of the appointment by the settlor under the power reserved to her by the deed, she never did exercise this power, and so on her death the only change that happened was that the interests of the children became indefeasible. This is exactly what happened in *Adamson v. Attorney-General* (7), which covers the present case. The result is that s. 1 of the Finance Act, 1894, does not apply.

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(1) (1849) 1 Mac. & G. 551.

(2) [1902] A. C. 14.

(3) (1862) 1 H. & M. 36, 41.

(4) [1928] Ch. 661.

(5) [1927] 2 Ch. 1.

(6) (1916) S. C. (H. L.) 25.

(7) [1933] A. C. 257.

H. L. (E.) It is, however, conceded that if and so far as the value of the children's interests at the death of their mother exceeded the value of those interests immediately before the death that surplus value is to be deemed property passing at the death by s. 2, sub-s. 1 (d); but if there was no difference in the value, it is submitted that nothing is deemed to pass.

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March 1. *J. H. Stamp* replied.

The House took time for consideration.

March 15. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion which my noble and learned friend Lord Tomlin has prepared, and which will be read by my noble and learned friend Lord Russell of Killowen. I entirely agree with it, and have nothing to add.

LORD TOMLIN. (1) My Lords, the questions raised by this appeal are concerned with the estate duty which became payable on the death of Mrs. Josephine Lawrence Butler, whom I will call the settlor, in respect of a fund settled by her in her lifetime. The settlement in question was dated November 20, 1925. The respondents were made the trustees of it and the property settled consisted of 20,000 fully paid deferred shares of 10*l.* each in a company called Butler Estates Company, Ltd.

The trusts declared of the shares and of the investments for the time being representing the same were (subject to a special power of appointment by the settlor) to divide the trust fund into three equal shares and to appropriate one such share to each of the settlor's three children—namely, Vera Lawrence Butler, Patience Mourilyan Butler and Francis Charles Joseph Butler, but so that the respondents should retain the shares so appropriated and should hold the share of each such child upon trust until such child should attain the age of twenty-one years or, being a daughter, marry, to apply the income at the respondents' discretion for his or her

(1) The opinion of Lord Tomlin was read by Lord Russell of Killowen.

maintenance, education or benefit, and to accumulate the surplus, and after such child should have attained the age of twenty-one years or being a daughter have married to pay the income to such child during his or her life (with a discretionary trust in the event of alienation) and at the death of such child in trust for the children or remoter issue of such child as such child should appoint with a provision in default of appointment and a provision for the accruer of any share in respect of which the above mentioned trusts should fail.

No dividend was declared in respect of the shares between the date of the settlement and the date of the deed of appointment which I shall next mention, and consequently no income was during that period paid or applied in accordance with the above mentioned provisions in default of appointment contained in the settlement.

By a deed of appointment dated September 26, 1928, the settlor in exercise of the power for that purpose given to her by the settlement appointed that the respondents should stand possessed of the trust fund upon the trusts declared in the first five clauses of the appointment.

The nature of the arguments developed before your Lordships' House renders it desirable to set out these clauses at length. They are as follows :—

“ 1. The trustees shall stand possessed of the trust fund upon trust during the life of the said Josephine Lawrence Butler to accumulate the yearly income thereof at compound interest by investing the same and the resulting income thereof in any of the investments authorized by the said settlement and from and after the death of the said Josephine Lawrence Butler the trustees shall stand possessed of the trust fund (which expression shall hereinafter include the accumulations of income thereof) in trust for the three children of the said Josephine Lawrence Butler namely Vera Lawrence Butler Patience Mourilyan Butler and Francis Charles Joseph Butler in equal shares but so that the share which after the death of the said Josephine Butler shall be so held in trust for each of the said three children shall not

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“ 2. During the life of such child the trustees shall pay the income of such share of the trust fund to him or her and so that in the case of a daughter the same shall during coverture be without power of anticipation.

“ 3. After the death of such child the trustees shall hold such share and the future income thereof in trust for all or such one or more exclusively of the others or other of the children or remoter issue of such child at such age or time or respective ages or times if more than one in such shares and with such future or other trusts for their respective advancement maintenance and education at the discretion of the trustees or any other persons or person and in such manner in all respects as such child shall from time to time by deed revocable or irrevocable or by will or codicil (without transgressing the law as to remoteness) appoint and in default of and subject to any such appointment in trust for all or any of the children of such child who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry if more than one in equal shares.

“ 4. Provided always that no child of such child of the said Josephine Lawrence Butler who or whose issue shall take any part of the said share of the trust fund under any appointment by virtue of the power of appointment lastly hereinbefore contained shall in default of appointment to the contrary be entitled to any share of the unappointed part thereof without bringing the share or shares interest or interests so appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly.

“ 5. If the trusts hereinbefore declared concerning the share of such child of the said Josephine Lawrence Butler as aforesaid in the trust fund shall fail then subject to the trusts powers and provisions herein declared and contained or by law vested in the trustees concerning the same share of the trust fund and to every or any exercise of such

respective powers the said share and any additional share or shares which may accrue or be added thereto by virtue of any provision for accruer herein contained and the income thereof respectively shall go and accrue by way of addition to the shares in the trust fund of the others of the said three children of the said Josephine Lawrence Butler in equal shares and so that the share which shall so accrue and be added to each of such other shares of the trust fund shall be held upon the trusts and with and subject to the powers and provisions (including provisions as to accruer to other shares) herein declared concerning the same or as near thereto as circumstances will admit."

The appointment contained a power of revocation exercisable by the settlor by deed or will. This power was never in fact exercised and the settlor died on October 15, 1930, leaving the appointment in operation, and survived by her three children named in the settlement and appointment. The three children are all living and none of them has ever been married.

The Crown by information claimed that upon the death of the settlor estate duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust fund including the accumulations or alternatively under s. 2, sub-s. 1 (*d*), of the same Act in respect of the life interests therein of the three children of the settlor.

Upon the hearing of the information Finlay J. held that the property did not pass under s. 1 of the Act but that the Crown was entitled to duty under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, and that by reason of s. 4 of the same Act the accumulations ought not to be aggregated with the other interests.

The formal order contained a declaration that upon the death of the settlor estate duty did not become payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust fund, and also a declaration that upon the death of the settlor estate duty at the appropriate rate became payable under s. 2, sub-s. 1 (*d*), of the Finance Act,

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H. L. (E.) 1894, in respect of the life interests in the settled fund of the three children of the settlor, but that the accumulations were not to be aggregated with the value of such life interests or with any other estate passing on the death of the settlor.

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On appeal by the Crown to the Court of Appeal the judgment of Finlay J. was affirmed. Romer L.J., however, pointed out that the order of Finlay J. was in form too favourable to the Crown as it did not limit the payment of duty to duty on the increase of value that accrued to the interests of the children by reason of the settlor's death.

There was, however, no cross-appeal before the Court of Appeal, and accordingly the formal order of the Court merely dismissed the appeal and affirmed the declaration of Finlay J. that no duty was payable under s. 1.

Subsequently the respondent obtained an extension of time for appealing against the order of Finlay J. and took the matter again to the Court of Appeal with a view to amending the second declaration in Finlay J.'s order in the sense indicated by Romer L.J.

This appeal succeeded, and an order was made allowing the appeal and substituting for the second declaration of Finlay J. a declaration that the beneficial life interest of each of the three children of the settlor in the trust funds (including the accumulations) to the extent to which the principal value of such beneficial life interest upon the death of the settlor exceeded the actual value (if any) of the expectant beneficial life interest of each child prior to such death was an interest accruing or arising on such death and was therefore to be deemed property passing on the death of the settlor under s. 2, sub-s. 1 (d), of the Finance Act, 1894, and that estate duty at the appropriate rate on the principal value of such excess was leviable and payable accordingly, but that for the purpose of determining the rate of estate duty to be paid on the property passing or deemed to pass on the death of the settlor the accumulations were not to be aggregated with such property.

The Crown now appeals to your Lordships' House against both orders of the Court of Appeal, contending that estate

duty at the appropriate rate became payable under s. 1 of the Finance Act, 1894, in respect of the principal value of the trust funds (including the accumulations) or alternatively that, if this was not so, duty became payable under s. 2, sub-s. 1 (d), and that the second declaration of Finlay J.'s order was in the right form.

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The provisions of the Finance Act to which I have referred so far as relevant are as follows :—

Sect. 1. "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty,' at the graduated rates hereinafter mentioned, ...

Sect. 2, sub-s. 1. "Property passing on the death of the deceased shall be deemed to include the property following, that is to say :—

"(d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

As was made clear by Lord Macnaghten in *Earl Cowley v. Inland Revenue Commissioners* (1) s. 1 of the Finance Act, 1894, gives effect to the principle that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding," while s. 2 is subsidiary declaring that the expression "property passing on the death of the deceased" shall be "deemed to include" certain things classified under four different heads to no one of which rightly understood is that expression literally applicable. The property which is envisaged as passing is the beneficial interest in property.

The first question to consider, therefore, is : Did any property

H. L. (E.) in fact pass by reason of the settlor's death? Now upon this part of the case the question seems to me to depend upon the proper construction to be put upon the appointment. On behalf of the Crown it is urged that the effect of the appointment is, first, during the life of the settlor to create a trust for the accumulation of the income of the fund by adding the same to the corpus for the benefit of those who take under the settlement which springs into existence at the settlor's death according to their respective interests under that settlement; and secondly, to create as from the settlor's death a settlement of the original trust fund and the accumulations under which there then arise for the first time life interests in favour of the three children in the original trust funds and the accumulations, followed by trusts for their issue with accruer clauses between the several stocks. Upon that view of the appointment it is contended that by reason of the death of the settlor property actually passed because the trust for accumulation ceased and the life interests of the children sprang into being for the first time.

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On the other hand the respondents contend, first, that the rule commonly known as the rule in *Lassence v. Tierney* (1) approved and applied by your Lordships' House in *Hancock v. Watson* (2) operates in the present case, with the result that upon the true construction of the appointment there is an absolute initial gift to the three children of the settlor in equal shares, and that the absolute initial gift of each share is only cut down if and when and while there is in existence some person qualified to take under the trusts of such share declared in derogation of the absolute gift and to the extent necessary to give effect to the rights of such person; and, secondly, that upon this view of the construction nothing passed by reason of the settlor's death.

My Lords, I am satisfied that the frame of the appointment is such as to attract the application of the rule in *Lassence v. Tierney* (1), which admittedly is to be regarded in construing non-testamentary instruments as well as in construing testamentary documents; the nature and effect of the rule is

(1) 1 Mac. & G. 551.

(2) [1902] A. C. 14.

stated by Lord Davey in *Hancock v. Watson* (1) in these terms: "It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be."

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In the present case it is to be observed that the gift is in the first instance absolute in form "in trust for the three children . . . in equal shares" and that, in the engrafted trusts introduced by the words "but so that," there is a direction for dealing with the thing described as "the share which after the death of the said Josephine Butler" (the settlor) "shall be so held in trust for each of the said three children," and throughout the clauses containing the engrafted trusts there are phrases indicating ownership such as the "share of each child" or "the shares in the trust fund of the others of the settlor's three children." Further I cannot find in the language of the engrafted trusts anything appropriate to have effect if there be a failure of the stocks of all three children. Having regard to the language and circumstances to which I have called attention I am of opinion that the case is one to which the rule in *Lassence v. Tierney* (2) falls to be applied. Further, the result of applying the rule is I think that the absolute gift stands, or, to employ Lord Davey's language, "takes effect," except to the extent to which it is cut down by the events which actually happen. At the death of the settlor nothing had happened to cut down the absolute gifts beyond the fact that all three children were living.

No doubt in respect of each share the absolute gift was defeasible because it might be defeated to a limited extent by the other children surviving so as to enjoy a life interest in it, or by the birth of issue becoming entitled under the trust, but the defeasibility was not ended by reason of the death of the settlor and even if it had been that would not have constituted a passing under s. 1 of the Act: see *Adamson v.*

(1) [1902] A. C. 22.

(2) 1 Mac. & G. 551.

H. L. (E.) *Attorney-General*. (1) But for the possibility of the birth of issue the three children together could in the settlor's lifetime have stopped the trust for accumulation and demanded a transfer to themselves of the whole fund and the accumulations. To-day, after the settlor's death, the position is the same. But for the possibility of the birth of issue the three children together could require that the whole fund and the accumulations should be transferred to them on their joint receipt. Their interests to-day are the same as they were before the settlor's death, i.e., they together own the whole fund and the accumulations subject to the same defeasance. Their position in this regard has not been altered by the settlor's death.

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If there has been a passing of property on the death there must have been a passing or shifting of the beneficial interest in the fund from one to another. But if the only persons beneficially interested in the fund immediately before the death are also the only persons beneficially interested in the fund immediately after the death (subject though their title is to the same possibility of defeasance) where is any passing or shifting to be found? In my opinion there is none.

It is admitted by the respondent that if there is no passing under s. 1 of the Act, s. 2, sub-s. 1 (d), will come into operation.

The question is how duty under that provision is to be assessed. It is I think clear that it is exigible only upon the amount of the excess (if any) by which the value of the interest accruing by reason of the death exceeds the value of the interest, if any, before the death, and the order of Finlay J. in this regard was wrong in form.

The respondent, though he has not appealed against the order of the Court of Appeal which dealt with this, has criticized its form as possibly precluding him from saying that the excess in the present case is nil.

I do not think that in the circumstances your Lordships would desire to modify the form of that order, but as it has evidently been based upon the declaration proposed by Lord Warrington of Clyffe in *Adamson v. Attorney-General* (2) I may perhaps be permitted to say that in my opinion Lord

(1) [1933] A. C. 257.

(2) Ibid. 257, 278.

Warrington of Clyffe did not intend to hold that in every case within the ambit of s. 2, sub-s. 1 (*d*), the value of the interest after the death must necessarily exceed the value of the interest before the death.

Further, having regard to some of the observations in the Courts below, I may perhaps also venture to observe that the ratio decidendi in *Adamson v. Attorney-General* (1) is not that on the execution of the settlement the beneficial interest in the whole fund passed out of the settlor but that it passed out of the settlor to the children whose interest was the same both before and after the death of the settlor subject only to this, that a possibility of defeasance came to an end with the death and that the cesser of that possibility of defeasance did not constitute a passing.

In the result, therefore, I am of opinion that this appeal fails on both points, and should be dismissed with costs.

LORD RUSSELL OF KILLOWEN. My Lords, for myself, I find myself in such complete agreement with the opinion which I have just read, both in its reasoning and its conclusions, that I have not thought it necessary to trouble your Lordships with any observations of my own.

LORD MACMILLAN. My Lords, I also am entirely in accord with the opinion of my noble and learned friend Lord Tomlin, and I have nothing to add.

LORD WRIGHT. My Lords, I also agree, and I have nothing to add.

Orders appealed from affirmed, and appeals dismissed with costs.

Lords' Journals, March 15, 1933.

Solicitor for appellant : *The Solicitor of Inland Revenue.*

Solicitors for respondent : *R. C. Bartlett & Co.*

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[HOUSE OF LORDS.]

H. L. (E.)* ASTOR APPELLANT ;

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AND

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DUNCAN AND OTHERS APPELLANTS ;

AND

ADAMSON (INSPECTOR OF TAXES) RESPONDENT.

Revenue—Income Tax—Foreign Securities—Stocks and Shares—Trust Deed—Income payable to Beneficiary—Power reserved to Beneficiary to revoke—Power to obtain beneficial enjoyment for Beneficiary himself—Income paid to Beneficiary—Liability of Beneficiary to Income Tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case V., Rules 1, 2—Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 20, sub-s. 1 (a).

A beneficiary, a British national resident in this country, being absolutely entitled to certain foreign stocks and shares, transferred them by a deed of settlement to foreign trustees resident in a foreign country upon trust to collect the income and after paying taxes and other expenses to pay the balance of the income for the benefit of the beneficiary for life. By a clause in the settlement power was reserved to the beneficiary at any time during his life by deed to revoke the settlement or to change or modify it as he might think fit.

It was agreed for the purposes of the case: (a) that the settlement was to be governed by the law of the foreign country; (b) that on a proper construction of the settlement under that law the beneficiary had no proprietary interest, legal or equitable, in either the corpus of the trust or the dividends or interest received by the trustees, that the whole legal and equitable proprietary interest therein was vested in the trustees, and that the sole right of the beneficiary was a right in equity to enforce performance of the trust by the trustees; (c) that by the foreign law the power of revocation reserved by the settlement was valid, but that until it was exercised it had no effect on the nature of the rights of the trustees and beneficiary respectively:—

Held, by Lord Atkin, Lord Tomlin, Lord Macmillan and Lord Wright (Lord Russell of Killowen dissenting) that as from the date of the settlement the beneficiary was assessable to income tax under Rule 2 of Case V. of Sch. D to the Income Tax Act,

* *Present*: LORD ATKIN, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

1918, on the amount received in the United Kingdom, and not under Rule 1 of that Case, for that the whole income of the trust fund was not to be deemed to be his income under s. 20, sub-s. 1 (a), of the Finance Act, 1922.

Orders of the Court of Appeal in *Perry v. Astor* [1934] 1 K. B. 260 and *Duncan v. Adamson* (unreported) reversed.

Marchioness of Ormonde v. Brown (1932) 17 Tax Cas. 333 approved.

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APPEAL from an order of the Court of Appeal (1) dated December 6, 1933, allowing an appeal from Finlay J. who affirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts upon a case stated under s. 149 of the Income Tax Act, 1918. The appellant had appealed to the Special Commissioners against assessments to Income Tax in the sums of 23,809*l.* for the year ending on April 5, 1930, 23,809*l.* for the year ending on April 5, 1931, and 25,245*l.* for the year ending on April 5, 1932. The assessments were made in respect of income from possessions outside of the United Kingdom, and purported to be made under Rule 1 of Case V. under Sch. D to the said Act of 1918.

The facts, which were not in dispute, were set out in the following paragraphs of the special case.

2. The appellant was resident in the United Kingdom and was a grandson of the first Lord Astor. Under a settlement made by the first Lord Astor and dated May 25, 1916, the appellant became absolutely entitled upon coming of age in August, 1928, to certain American stocks and shares.

3. By a settlement dated September 13, 1929, the appellant transferred the said stocks and shares to the City Bank Farmers Trust Company (an American company), hereinafter called the trustees, to be held upon the trusts set out in the following paragraph :—

4. It was provided that the trustees should collect the income arising from the trust estate and after paying the taxes and other incidental expenses and charges properly chargeable against income should pay or apply the balance

(1) [1934] 1 K. B. 260.

H. L. (E.) of the said income to or for the use of the appellant during his life in such amounts and at such dates as he might from time to time direct, and that upon the death of the appellant the trustees should distribute the capital of the trust fund then in their possession to such persons as the appellant should by will or codicil appoint and in default of such appointment to the issue of the appellant then surviving in equal shares per stirpes, and should he leave no issue to the descendants of his father living at his death in equal shares per stirpes.

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By clause 9 power was reserved to the appellant at any time or times during his life by instrument under his hand and seal to revoke the settlement and the trust thereby created concerning all or any part or parts of the trust fund, whether capital or income, or to change or modify the same in any way or to any effect which the appellant might think fit or proper.

5. It was agreed for the purposes of the present appeal :—

(a) That the trust settlement was governed by the law of the State of New York.

(b) That upon a proper construction of the trust settlement under that law the appellant had no proprietary interest, legal or equitable, in either the specific assets constituting the corpus of the trust or the specific dividends or interest collected by the trustees ; that the whole legal and equitable proprietary interest therein was vested in the trustees, and that the sole right of the appellant was the right in equity to enforce performance of the trust against the trustees and in particular to call upon them to pay over at such times as the appellant might direct the balance of income in the trustees' hands after deducting outgoings from the dividends and interest collected ; and

(c) That under the aforesaid law the provision of the trust settlement reserving to the appellant a power of revocation was valid, but, unless and until it was exercised, had no effect on the nature of the rights accruing under the settlement to the trustees and the appellant respectively as explained in paragraph (b) above.

6. The appellant had not during the years in question exercised the power of revocation reserved to him by clause 9 of the settlement or made any appointment affecting the trust fund or any part thereof.

7. The assessments under appeal were made under Rule 1 of Case V. of Sch. D (1) on the basis that the whole of the income arising from the stocks and shares constituting the trust fund must be deemed for the purpose of income tax to be the income of the appellant under s. 20, sub-s. 1 (a), of the Finance Act, 1922 (1), on the ground that he could, without the consent of any other person, have obtained for himself the beneficial enjoyment thereof.

8. The appellant contended :—(1.) that the income of the trust fund was income of the trustees, a company resident abroad, and was derived from sources outside the United Kingdom and was, therefore, not within the scope of the Income Tax Acts, and s. 20, sub-s. 1 (a), of the Finance Act, 1922, had no application to it, and *Marchioness of Ormonde v. Brown* (2) was referred to ;

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(1) The material provisions of the Finance Act, 1922, s. 20, are set out in the judgment of Lord Macmillan, p. 411 post.

Rules 1 and 2 applicable to Case V. of Sch. D are as follows :

" 1. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in rule 1 of the rules applicable to Case IV., and the provisions of this Act, including those relating to the delivery of

statements, shall apply accordingly.

" 2. The tax in respect of income arising from possessions out of the United Kingdom, other than stocks, shares or rents, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I., without any deduction or abatement other than is therein allowed."

(2) 17 Tax Cas. 333.

H. L. (E.) (b) that he could not, without the consent of the trustees, obtain for himself the beneficial enjoyment of the income ;
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 ASTOR (c) that s. 20, sub-s. 1 (a), of the Finance Act, 1922, could
 v. not apply as he was already in beneficial enjoyment of the
 PERRY. income under the settlement, whereas the sub-section applies
 DUNCAN only to persons who are not in beneficial enjoyment and can
 v. only become so by exercising a power of revocation or other
 ADAMSON. power ;

(d) that he was only chargeable under Rule 2 of Case V. of Sch. D on the amounts received by him in the United Kingdom.

9. It was contended on behalf of the Crown :—

(a) that the income of which the appellant had the beneficial enjoyment was income from a possession ;

(b) that the appellant was able, without the consent of any other person, by means of the exercise of the power of revocation, to obtain for himself the beneficial enjoyment of the whole of the income arising from the trust fund ;

(c) that such income must, under s. 20, sub-s. 1 (a), of the Finance Act, 1922, be deemed to be his income for the purposes of the Income Tax Acts.

The Special Commissioners held that the case fell within *The Marchioness of Ormonde v. Brown* (1) and that the appellant could not be charged with income tax on foreign income which, under the settlement, was the income of the American trustees.

The special case was heard before Finlay J., who affirmed the decision of the Special Commissioners.

On appeal by the Inspector of Taxes, the Court of Appeal (Lord Hanworth M.R. and Slessor and Romer L.JJ.) reversed the decision of Finlay J. : see *Perry v. Astor*. (2)

Hence the appeal to this House.

DUNCAN AND OTHERS v. ADAMSON.

Appeal from an order of the Court of Appeal, dated July 10, 1934, affirming an order of Finlay J. upon a case stated by the Commissioners for the Special Purposes of the

(1) 17 Tax Cas. 333.

(2) [1934] 1 K. B. 260.

Income Tax Acts under s. 149 of the Income Tax Act, 1918. H. L. (E.)

The appellants, who were the executors of the late Walter Atholl Duncan, hereinafter called the deceased, had been assessed to income tax under Case V. of Sch. D to the Income Tax Act, 1918, for the years ending on April 5, 1932, and April 5, 1933, in respect of income from possessions from outside of the United Kingdom. They appealed from these assessments by way of a case stated under s. 149 of the Income Tax Act, 1918.

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The special case stated the facts as set out in the following paragraphs :—

2. The deceased died on August 13, 1932. For some years before his death he resided in the United Kingdom.

3. By a settlement dated May 20, 1926, executed in Paris, the deceased transferred certain shares in Duncan Brothers & Co., Ltd., a company registered and carrying on business in Calcutta, to trustees to pay the income therefrom to himself during his life and after his death to his widow during her life, and subject thereto on certain trusts for his children. By clause 14 of the settlement the deceased reserved to himself an absolute power to vary or revoke any of the trusts declared by the settlement.

4. By a declaration of trust dated March 1, 1928, the deceased transferred certain further shares in Duncan Brothers & Co., Ltd., of Calcutta, to the trustees of the settlement.

5. The trustees of the settlement were at all material times resident in British India.

6. Until January, 1929, the income of the settled shares was remitted to the deceased in this country through Messrs. Walter Duncan & Co., of London, who accounted to the Crown for the British income tax in respect thereof. During the two years under appeal no income was remitted by the trustees to the deceased in this country.

7. It was agreed for the purposes of the present appeal that the trust settlement was governed by the law of British India, and that upon a proper construction of the trust settlement under that law, the deceased had no proprietary interest, legal or equitable, in the specific assets constituting

H. L. (E.) the corpus of the trust, or in the specific dividends collected by the trustees, and that the sole interest of the deceased therein was his right to call upon the trustees and, if necessary, to compel them to administer the trust so as to give him the income according to the trusts of the settlement.

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8. The appellants contended :—

(a) that s. 20, sub-s. 1 (a), of the Finance Act, 1922, was not applicable to the circumstances of this case ;

(b) that as from the date of the settlement the deceased was chargeable under Rule 2 of Case V. of Sch. D, on the basis of the sums remitted ;

(c) that as in the two years under appeal there had been no remittances, the assessments should be discharged.

9. On behalf of the Crown it was urged :—

(a) that the deceased was able without the consent of any other person by means of the exercise of the power of revocation reserved in the settlement to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares constituting the trust fund ;

(b) that this income was within the scope of the Income Tax Acts, and under s. 20, sub-s. 1 (a), of the Finance Act, 1922, must be deemed for the purpose of income tax to be income of the deceased.

10. The Special Commissioners held that s. 20, sub-s. 1 (a), of the Finance Act, 1922, did not apply to the income in question, and accordingly discharged the assessments.

The special case was heard by Finlay J. on June 29, 1934. Before that date, namely, on December 6, 1933, the case of *Perry v. Astor* (1) had been decided in the Court of Appeal. In that case, upon facts indistinguishable in principle from those in the present case, the Special Commissioners had decided in favour of the subject and against the Crown that the former were taxable under Rule 2 of Case V. of Sch. D and not under s. 20, sub-s. 1 (a), of the Finance Act, 1922, and Rule 1 of Case V. of Sch. D. An appeal by way of special case was dismissed by Finlay J. On an appeal to

(1) [1934] 1 K. B. 260.

the Court of Appeal the decision of Finlay J. was reversed. In consequence of that decision of the Court of Appeal, Finlay J. in the present case allowed the appeal and reversed the decision of the Special Commissioners. The present appellants appealed to the Court of Appeal, and that Court, following their former decision in *Perry v. Astor* (1), affirmed the decision of Finlay J.

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Hence this appeal.

Feb. 14. *A. M. Latter K.C.* and *Hon. Cyril Asquith* for the appellant in *Astor v. Perry*.

Wilfrid Greene K.C., *A. Andrewes-Uthwatt* and *A. T. Macmillan* for the appellants in *Duncan and Others v. Adamson*.

The argument for the appellants appears in the opinion of Lord Macmillan. Counsel cited *Colquhoun v. Brooks* (2); *Tennant v. Smith* (3); *Greenwood v. F. L. Smith & Co.* (4) and *Whitney v. Commissioners of Inland Revenue*. (5)

Feb. 15. *Sir Donald Somervell S.-G.*, *J. H. Stamp* and *R. P. Hills* for the respondents in both appeals. The wording of s. 20, sub-s. 1, of the Finance Act, 1922, is so clear as to admit of no doubt. The intention of the Legislature is quite plain. It is not for courts of law to impute any other than the expressed intention, even though that intention may lead to strange results in certain cases: *Drummond v. Collins* (6), per Lord Loreburn, quoting Lord Cairns. *Colquhoun v. Brooks* (7) is distinguishable. In that case the question was whether the profits and gains in dispute fell to be charged under Case I. or Case V. of Sch. D of the Income Tax Act, 1842; not whether, as in the present appeals, the interests of the appellants are chargeable with income tax at all.

Feb. 18. *A. M. Latter K.C.* replied in *Astor v. Perry*.

Feb. 19. *Wilfrid Greene K.C.* replied in *Duncan and Others v. Adamson*.

The House took time for consideration.

(1) [1934] 1 K. B. 260.

(4) [1922] 1 A. C. 417, 423.

(2) (1889) 14 App. Cas. 493, 503.

(5) [1926] A. C. 37, 55, 56.

(3) [1892] A. C. 150, 161.

(6) [1915] A. C. 1011, 1018.

(7) 14 App. Cas. 493.

H. L. (E.) March 15. LORD ATKIN. My Lords, in these two cases I have had the opportunity of reading the opinion which is about to be pronounced by my noble and learned friend Lord Macmillan. I entirely agree with it, and find it unnecessary to add anything to it ; and I am requested by my noble and learned friend Lord Tomlin, who unfortunately is unable to be present here to-day, to say that he also agrees with it.

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LORD RUSSELL OF KILLOWEN. My Lords, I, too, have had an opportunity of reading and considering the opinion about to be delivered by my noble and learned friend Lord Macmillan, but unfortunately I find myself in disagreement with him and the others of your Lordships concerning these appeals. I cannot justify to myself the departure which you are prepared to make from the language used in s. 20, sub-s. 1, of the Finance Act, 1922.

The words relevant to the present case are crystal clear. "Any income—(a) of which any person is able . . . without the consent of any other person by means of the exercise of any . . . power of revocation . . . by virtue . . . of a disposition made . . . by himself, to obtain for himself the beneficial enjoyment . . . shall . . . be deemed for the purpose of the enactments relating to income tax (including super-tax) to be the income of the person who is . . . able to obtain the beneficial enjoyment thereof . . . and not to be for those purposes the income of any other person." There must, of course, be the necessary limitation which is inherent in all our income tax legislation—namely, that what is taxed under or by virtue of this provision can only be either (1.) income which is here, or (2.) income of a person resident here. So far I believe there is no difference of opinion among us ; nor is it I think in dispute that, if no further limitation is placed on the words of the section, the case of Mr. Astor (for I will deal with his case in the first instance) falls precisely under those words. The income received by the trustees in the United States is income of which he is able, without the consent of any other person by means of the exercise of the power of revocation contained in the

settlement made by himself, to obtain for himself the beneficial enjoyment ; with the result, if the section applies, that such income is to be deemed for the purposes stated, to be his income and no one else's.

Your Lordships, however, are of opinion that the section does not apply to the case of Mr. Astor because in your view the section should be subjected to another and further limitation in that the income there mentioned should be confined to income already charged to tax, and that all that the section accomplishes is to shift the burden, and to substitute one person for another as the person liable to be charged in respect of income already chargeable.

The justification for so departing from the language employed is, as I understand it, of this nature :—A variety of instances are given to show that if read without the further limitation the section may result in no tax being payable in respect of income which is in fact being received by a person resident here. These are said to be anomalies, and to be in conflict with the provisions of Sch. D ; and because of this it is said that upon the authority of *Colquhoun v. Brooks* (1) we are entitled to give to the words of s. 20, sub-s. 1, a meaning different from their ordinary meaning. Other parts of the section are also pointed to, as raising difficulties in their application to cases where the person in fact entitled to the income is resident abroad.

My Lords, to say that the natural meaning of the words is in conflict with the provisions of Sch. D is not in my opinion an accurate statement. The income escapes taxation in the cases put only because the artificial facts which the Legislature has created, take it out of the annual profits or gains covered by Sch. D. The two enactments are not inconsistent ; there is no conflict, except the conflict of facts which necessarily arises when the Legislature enacts that what is not the fact is to be deemed to be the fact. In *Colquhoun v. Brooks* (1) the sole question was whether profits of a trade carried on exclusively abroad fell within Case 1 or Case 5 of Sch. D of the Act of 1842. As Lord Macnaghten pointed out, the

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H. L. (E.) wording of both cases was apt for the purpose of including the profits in question; but a consideration of various other provisions of the Act established, from the language which the Legislature had used, that while profits from a trade carried on here, or partly here and partly abroad, fell under Case 1, profits from a trade carried on exclusively outside Great Britain fell under Case 5. Both Lord Herschell and Lord Macnaghten point out, as I read their speeches, that startling results are not of themselves sufficient to warrant a departure from the ordinary meaning of the words of a statute. *Colquhoun v. Brooks* (1) is not in my opinion an authority in point here. My noble and learned friend Lord Macmillan also prays Lord Loreburn in aid, and cites from his speech in *Drummond v. Collins* (2) an extract in which he refers to *Colquhoun v. Brooks*. (1) I could have wished that the choice had fallen upon a passage from the same speech which exactly expresses my views in regard to the present case, and in which Lord Loreburn uses the following words (3): "Lord Cairns long ago said that 'if the person sought to be taxed comes within the letter of the law, he must be taxed.' And though there have been cases in which the letter of the law has been disregarded in view of other statutory language, I think it can be done only in case of necessity. It must be a necessary interpretation."

My Lords, I can find no necessary interpretation here. The plain words of the Act may in some cases lead to results which to some may appear strange. That does not concern us, or justify us in altering the meaning of the plain words, in order to produce what we may consider more sensible or less anomalous results. That course is only open to us if we find it necessitated by the language employed in other parts of the statute.

One argument needs perhaps to be specifically considered. It was said that one result of reading the section as I read it would be this: That Mr. Astor would be liable to pay tax in respect of the income received by the trustees in the

(1) 14 App. Cas. 493.

(2) [1915] A. C. 1011.

(3) Ibid. 1018.

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United States as income deemed to be his, and also liable to pay tax on the income which the trustees were bound to pay over, the latter being (within the decision in the second *Archer-Shee* case (1)) the income springing from a foreign possession—namely, his right of action against the trustees. In my opinion no such double taxation could occur and for the reason given by Romer L.J. Once the income which is the property of the trustees is to be deemed the income of Mr. Astor (i.e., is to be treated for the purposes of the Income Tax Acts in all respects as if it was the property of Mr. Astor), it automatically becomes impossible for the purposes of those Acts to say that he receives anything which springs from a right of action against the trustees in respect of their income.

In view of the fact that your Lordships take a different view I will not occupy time in dealing with the other points argued on behalf of the appellants. Suffice it to say that on consideration I can find nothing in the various provisions of the section in question, or in the consequences said to flow therefrom if construed without the suggested qualification, to induce, much less to compel, me to depart from the ordinary meaning of the language which the Legislature has used.

My noble and learned friend Lord Macmillan in his opinion most properly proclaims our disability to amend the law. For myself I feel unable by reason of that very disability to allow Mr. Astor's appeal.

I agree with the decision of the Court of Appeal and would dismiss the appeal accordingly.

The same result should follow in the appeal of *Duncan v. Adamson*, as it was conceded that the two appeals must necessarily share the same fate.

LORD MACMILLAN. My Lords, the appellant, Mr. Astor, is, within the meaning of the Income Tax Acts, a "person residing in the United Kingdom". In 1928 he became the owner of certain stocks and shares in the United States of America. By a settlement dated September 13, 1929, he

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H. L. (E.) transferred these stocks and shares to a trustee resident in the United States of America. Under the trust so constituted the duty of the trustee is to collect the income arising from the trust estate, and, after paying the taxes and other incidental expenses and charges properly chargeable against income, to pay or apply the balance of the income to or for the use of the appellant during his life as he may direct. Power is reserved to the appellant to revoke the settlement and the trust thereby created in whole or in part at any time during his life.

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It is agreed that the trust is governed by the law of the State of New York and that by the law of that State the appellant has no proprietary interest, legal or equitable, either in the specific stocks and shares forming the capital assets of the trust or in the specific dividends or interest collected by the trustee. The sole right of the appellant is to enforce performance of the trust, and in particular to call upon the trustee to pay over to him, as he may direct, the balance of income in the trustee's hands after deducting outgoings. It is further agreed that, according to the law of the State of New York, the power of revocation reserved to the appellant is valid, but that, unless and until exercised, it has no effect on the nature of the appellant's rights under the settlement as above described. The appellant has not exercised his power of revocation.

Had the settlement contained no power of revocation the annual profits or gains arising or accruing to the appellant from his equitable interest under the trust would have been chargeable to income tax under Rule 2 applicable to Case V. of Sch. D, as being income arising from a possession out of the United Kingdom other than stocks, shares or rents. Under that rule the tax would have been computed "on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom . . . on an average of the three preceding years. . . ." That is the effect of the decision of your Lordships' House in *Archer-Shee v. Garland* (1), as applied to the facts of the

present case, apart from the question of the effect of the revocation clause. H. L. (E.)

But the existence of the reserved power of revocation in the settlement is said by the Crown to alter the position. The point arises in this way. Formerly under Case V. tax on income from all foreign possessions was without distinction charged only on the actual sums annually received in the United Kingdom on a three years' average. The Finance Act, 1914, however, by s. 5, introduced a distinction between income arising from securities, stocks, shares or rents in any place out of the United Kingdom and income arising from other possessions out of the United Kingdom, and provided that the former should be computed "on the full amount of the income whether the income has been or will be received in the United Kingdom or not". This provision is reproduced in the present Income Tax Act, 1918, as regards securities, in Rule 1, applicable to Case IV. of Sch. D, and as regards stocks, shares or rents, in Rule 1 applicable to Case V. of Sch. D.

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Then in 1922 there was enacted by the Finance Act of that year a new provision which has given rise to the question now at issue. It is contained in s. 20, which it is necessary to quote at considerable length in order to appreciate the nature of the enactment. The material parts of the section read as follows :—

" 20 (1.) Any income—

(a) of which any person is able without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment ; or

(b) which by virtue or in consequence of any disposition made, directly or indirectly, by any person (other than a disposition made for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person for a period which cannot exceed six years

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 PERRY. . . . able to obtain the beneficial enjoyment thereof, or of
 DUNCAN the person, if living, by whom the disposition was made, as
 v. the case may be, and not to be for those purposes the income
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“(2.) Where by virtue of paragraph (b) of sub-s. 1 of this section any income tax or super-tax becomes chargeable on and is paid by the person by whom the disposition was made, that person shall be entitled to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the disposition the amount of the tax so paid, and for that purpose to require the Commissioners concerned to furnish to him a certificate specifying the amount of the income in respect of which he has so paid tax and the amount of the tax so paid, and any certificate so furnished shall be conclusive evidence of the facts appearing thereby.

“(3.) Where any person obtains in respect of any allowance or relief a repayment of income tax in excess of the amount of the repayment to which he would but for the provisions of paragraph (b) of sub-s. 1 of this section have been entitled, an amount equal to the excess shall be paid by him to the trustee or other person to whom the income is payable by virtue or in consequence of the disposition, or where there are two or more such persons shall be apportioned among those persons as the case may require.

“If any question arises as to the amount of any payment or as to any apportionment to be made under this sub-section, that question shall be decided by the General Commissioners, whose decision thereon shall be final.”

In reliance upon the combined effect of this section and Rule 1 applicable to Case V. of Sch. D, assessments to income tax were made upon the appellant for each of the three years 1929-30, 1930-31 and 1931-32 in respect of the whole income received in those years by the trustee in the United States in the shape of dividends and interests on the stocks and

shares in the United States of which the trust estate consists. The question is whether these assessments are justified or whether, as the appellant contends, he ought to be assessed under Rule 2 only on the full amount of the actual sums annually received by him in the United Kingdom from the American trustee.

The Special Commissioners held that the matter was concluded by the decision of Finlay J., in the case of *Marchioness of Ormonde v. Brown* (1), and that s. 20, sub-s. 1 (a), of the Finance Act, 1922, could not be applied so as to charge the appellant with income tax on foreign income which under the provisions of the settlement was income of the American trustee. They accordingly amended the assessments by substituting amounts computed under Rule 2 of Case V. for those computed under Rule 1.

The Crown appealed to the King's Bench Division, and, on the case coming before Finlay J., admitted that it was entirely covered by his decision in the case of the *Marchioness of Ormonde v. Brown*. (1) The decision of the Special Commissioners was accordingly affirmed without argument. On a further appeal by the Crown the Court of Appeal unanimously reversed the decision of Finlay J. and upheld the original assessments.

My Lords, the argument for the Crown has at first sight an attractive simplicity. Is the appellant able, by means of the exercise of a power of revocation contained in a disposition, made directly by himself, to obtain for himself the beneficial enjoyment of the income which under that disposition his American trustee collects? The answer must plainly be in the affirmative. And does that income arise from stocks and shares in a place out of the United Kingdom? The answer must again be in the affirmative. The words of s. 20 and Rule 1 of Case V. fit the facts precisely, and that, contends the Crown, must end the matter.

This appearance of simplicity is delusive, for if, as the Crown submits, the critical words "any income" with which s. 20 opens, are read without any qualification, territorial

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H. L. (E.) or other, the most startling anomalies result. Thus if the section is to be read as applicable to any income anywhere of which any person anywhere can by the exercise of a power of revocation obtain for himself the beneficial enjoyment it covers the case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country. In the case put, the American settlor is able by exercising his power of revocation to obtain for himself the beneficial enjoyment of the income of the stocks and shares which he has settled. That income, therefore, is to be deemed for British income tax purposes to be his income and not to be the income for those purposes of the person resident in this country who is entitled to it. Incidentally one asks how a British Income Tax Act can impute to an American citizen "for the purposes of the enactments relating to" [British] "income tax (including super-tax)" an income of which the American citizen has by the law of his own country effectually divested himself. Or suppose a resident in America makes a disposition there under which the income of American stocks and shares is payable to a resident in the United Kingdom for a period of five years. The section, read literally, as the Crown would have your Lordships read it, would have the effect, under para. (b), of deeming the income to be the income of the American resident who made the disposition and not the income of the beneficiary in this country. In both the cases supposed the person resident in this country would under s. 20 be entirely exempt from tax in respect of the income, however large, to which he was entitled under the American disposition, even although the whole of it were remitted to him in this country.

Perhaps the most anomalous because the simplest case that could be put is that of a person resident in this country who makes a revocable settlement of assets abroad under which another person also resident in this country is the beneficiary of the income. The settlor then goes abroad and ceases to be resident in this country. Under s. 20 the income

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is still, according to the Crown, to be deemed to be his income and not that of the beneficiary ; the result is that neither the settlor nor the beneficiary pays any tax, although the whole of the income may be received and enjoyed by the beneficiary in this country.

But under Sch. D the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere are chargeable to tax. Under this, which is a cardinal provision of our income tax legislation, the income, in the three cases I have put, would be chargeable to tax while under s. 20 of the 1922 Act (which by s. 49 thereof is to be construed together with the Act of 1918 of which Sch. D is a part) the same income would be exempted from tax.

The learned Solicitor-General did not flinch from these remarkable results of his unqualified reading of the words "any income" in the Act of 1922, but to your Lordships they may well suggest a doubt whether these words should not be read in a sense which would avoid such a conflict.

But there are further difficulties. The section applies not only to cases where a person by the exercise of a power of revocation can obtain for himself the beneficial enjoyment of income ; it applies also to cases where a person can do so by the exercise of a power of appointment. Suppose that an American resident by an American settlement of American stocks and shares conferred on a resident in this country a power of appointment of the income, which the donee of the power could exercise in his own favour. The income which he could appoint to himself would be deemed to be his income, although he had not exercised the power, but in that case his income would not be income arising from specific stocks or shares in America but from his equitable right to the American trust income and would be taxed under Rule 2 of Case V. on the amount actually received by him in this country, and not under Rule 1 on the whole income received by the American trustee.

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Then sub-s. 2 also raises difficulties. If the Crown is right, then if a person resident in this country makes a disposition of the income of American stocks and shares in favour of a resident in America for a period of five years and under s. 20, sub-s. 1 (b), is charged with tax on that income, he is under sub-s. 2 given a right to recover the tax so paid from the American beneficiary. A reading of our income tax legislation which leads to the remarkable result of imposing a liability of recoupment on an American citizen is not lightly to be accepted. Sub-s. 3 carries the matter still further, for it would in the case just figured require the person resident in this country in certain contingencies to pay to his American beneficiary sums in addition to the income which he had settled on him, which would be fair enough if under sub-s. 2 he could succeed in recovering from him the tax paid in this country, but would otherwise be quite unreasonable.

My Lords, I venture to think that the conflict and the anomalies to which I have drawn attention arise, in the words of my noble and learned friend Lord Tomlin, "from the fact that the amendments from time to time made to the Income Tax Acts, directed as they frequently are to stopping an exit through the net of taxation freshly disclosed, are too often framed without sufficient regard to the basic scheme upon which the Acts originally rested": *Neumann v. Inland Revenue Commissioners*. (1) The enactment contained in s. 20 is intelligible and practicable where all the parties concerned are within the United Kingdom, and doubtless that was the case which the Legislature had in contemplation. The possible extra-territorial effects of the section were obviously not thought out, and the task of reconciling the resulting conflict, which the Legislature has omitted to perform, is imposed upon your Lordships. But your Lordships in your judicial capacity are under a disability from which the Legislature is free, for you have no power to amend the law. However anomalous an enactment may be, it must be applied by the Courts according to its terms, unless these terms are susceptible, according to the accepted

(1) [1934] A. C. 215, 222.

canons of construction, of an interpretation which avoids the anomalies. H. L. (E.)

Fortunately your Lordships are not without authoritative guidance as to the principles upon which the language of taxing statutes may legitimately be construed. In the leading case of *Colquhoun v. Brooks* (1), the Crown were able, as here, to contend that the statutory language precisely covered their case. "I think," said Lord Herschell (2), "that giving to the language of the enactment its natural meaning the facts stated do apparently bring this case within it." But he went on to point out that where, as here again, the words of a statute according to their natural meaning lead to "strangely anomalous" results, it is legitimate to examine their statutory context in order to see whether they ought to be construed as they would be if read alone. "Courts of law," says Lord Loreburn L.C., "have cut down or even contradicted the language of the Legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown. A notable instance is the case of *Colquhoun v. Brooks* (1), decided nearly thirty years ago, and always followed": *Drummond v. Collins*. (3)

So far as the intention of an enactment may be gathered from its own terms it is permissible to have regard to that intention in interpreting it, and if more than one interpretation is possible that interpretation should be adopted which is most consonant with and is best calculated to give effect to the intention of the enactment as so ascertained. More especially, where two sections forming part of a single statutory code are found, when read literally, to conflict, a Court of construction may properly so read their terms as, if possible, to effect their reconciliation.

My Lords, I now propose to examine rather more closely the actual language and structure of s. 20 as a whole in order to see whether any aid is thus afforded in ascertaining the

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(1) 14 App. Cas. 493.

(2) Ibid. 503.

(3) [1915] A. C. 1011, 1017.

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“ any income ” with which the section opens. It has to be observed at the outset that the section does not provide that the power of appointment or the power of revocation is to be deemed to have been exercised. On the contrary, it assumes that the power has not been exercised and that the income will continue in fact to be applied as the disposition directs. The section does not declare that the dispositions with which it deals are to be treated as non-existent in a question between the maker of the disposition and the Inland Revenue. The scheme of the section is that the income which the settlor by his disposition has diverted from himself and conferred on another shall be notionally restored to him while in fact continuing to be applied as he has directed. Income which in fact is the income of B is to be deemed for income tax purposes to be the income of A.

The purpose is notionally to transfer B's income to A, so that A may be charged to tax on the aggregate of his own and B's income. The person to whom the income is payable under the disposition and the person who has made the disposition are to be treated notionally as a single taxpayer. The incomes of the two persons are to be amalgamated. The contention of the Crown goes much further ; it proposes not to amalgamate the actual incomes of A and B but to amalgamate with A's income, not the income which he has conferred on B, but the income which A would have had if he had never made any disposition in favour of B, and it further proposes in the process of amalgamation to change the taxable character of B's income so as to render it chargeable under a different head.

In the present case the income of the trustee is the income of a resident in America derived under an American disposition from American assets. Prima facie the income tax authorities have no concern with it. But they have concern with the income of residents in the United Kingdom and our Legislature can of course competently “ determine the measure of taxation to be applied in the case of a person so resident ”

by any standard it pleases: *Colquhoun v. Brooks*. (1) If a resident in this country has possessions out of the United Kingdom the Legislature has provided how he shall be taxed in respect of such possessions; if they are securities, stocks, shares, rents, he pays on the full amount of the income therefrom whether brought home or not; if they are not of this character he pays on the amount actually brought home. It is with this existing scheme that s. 20, which is to be read along with it, has to be reconciled. I have shown how on the Crown's reading these enactments come into conflict. The reconciliation is, I suggest, to be effected by reading s. 20 as designed to effect a notional amalgamation of two existing incomes both charged to income tax by the existing law. If the words "any income" are construed, as they reasonably may be, to mean any income chargeable with tax under the British Finance Act of the year, the difficulties of the Crown's interpretation to a large extent disappear. For the income of the American trustee, being the income of a foreign non-resident, is not brought into charge, while the income so far as received by the resident in this country is, consistently with the scheme of the Income Tax Acts, brought into charge under its appropriate head, in the present instance Rule 2, and is by force of s. 20 amalgamated with the resident's income derived from sources within the United Kingdom.

In reaching this conclusion I have not been much moved by the argument that s. 20 rightly regarded is not a charging section and so ought not to be read as imposing a charge which is not elsewhere created. It seems to me that to say that a particular item of income which belongs to B is for Income Tax purposes to be deemed to belong to A is quite an effectual way of charging A with tax on the transferred income. In *Kirke's Trustees v. Commissioners of Inland Revenue* (2), this House had before it the following words in Rule 4 applicable to Cases I. and II. of Sch. D: "Where any person has received repayment of any amounts previously paid by him by way of excess profits duty the amount repaid shall be treated as profit

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(1) 14 App. Cas. 504.

(2) 1927 S. C. (H. L.) 56, 64; 11 Tax Cas. 323.

H. L. (E.) for the year in which the repayment is received.” Lord Sumner in construing this provision expressed the view that the word “treated” was “an apt word to impose a charge”. “Deemed” in my view is a synonym of equal efficacy. Indeed, on the reading of s. 20 which I propose to your Lordships, the section is a charging section in the sense that it charges with tax on certain income a person who would not otherwise be chargeable with tax on that income. But it is not a charging section, as the Crown would make it out to be, in the sense of charging with tax income which according to the existing law could not be charged at all except so far as received in this country. As Lord Wrenbury pointed out in *Williams v. Singer* (1):—“The two things are quite distinct; the property chargeable is one thing, the person liable to be charged is another.” The result of the process of “deeming” which the section directs is in my opinion not to bring into tax income not previously chargeable but to substitute one person for another as the person liable to be charged in respect of income already chargeable. To justify reading the section as on the one hand imposing a charge on income not at present subject to charge and on the other hand as exempting from charge altogether income which is at present chargeable—for that is the result of the Crown’s contention—would in my view require much more express and precise language than the section contains.

Some confusion is created in the present case by the circumstance that the appellant is at one and the same time the maker of the disposition in question and the person entitled to the income arising under it. I have disregarded this specialty, for it is obviously merely accidental and irrelevant to the argument; but it may be pointed out that the section certainly does not in any event very well fit the case, for it would be odd that the income of the funds covered by the disposition should be “deemed” to be the income of the person whose income it is in fact. It is, however, on much more fundamental grounds that I have reached the conclusion that the Crown’s contentions must fail.

The result on the whole matter is that in my opinion the case of *The Marchioness of Ormonde* (1) and this case, were rightly decided by Finlay J., and that the judgment of the Court of Appeal in the present case should be reversed with costs, and the judgment of Finlay J. restored.

The appeal in the case of *Duncan and Others v. Adamson*, also set down for consideration by your Lordships to-day, raises, as was agreed at the Bar, precisely the same question of law as that with which I have just dealt. In this instance, however, the decision of Finlay J. was in favour of the Crown, following the judgment of the Court of Appeal in the case of Mr. Astor, and I propose accordingly that your Lordships should reverse, with costs, the judgments of Finlay J. and the Court of Appeal and restore the determination of the Special Commissioners.

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LORD WRIGHT. My Lords, I have had the opportunity of considering in print the opinion which has just been delivered by my noble and learned friend Lord Macmillan. I am so fully in accord with the reasoning and the conclusions of that opinion that I have nothing to add.

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Order appealed from reversed: Judgment of Finlay J. thereby set aside, restored: Ordered that the respondent do pay to the appellant the costs incurred by him in the Court of Appeal and also his costs of the appeal to this House: Ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Lords' Journals, March 15, 1935.

DUNCAN AND OTHERS v. ADAMSON.

Order appealed from reversed: Determination of the Commissioners for the Special Purposes

(1) 17 Tax Cas. 333.

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of the Income Tax Acts, restored : Ordered that the respondent do pay to the appellants the costs incurred by them in the Courts below and also their costs of the appeal to this House : Ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Lords' Journals, March 15, 1935.

Solicitors for appellant in *Astor v. Perry* : *Janson, Cobb, Pearson & Co.*

Solicitor for respondent : *The Solicitor of Inland Revenue.*

Solicitors for appellants in *Duncan and Others v. Adamson* : *Sanderson, Lee & Co.*

Solicitor for respondent : *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* SIMPSON (INSPECTOR OF TAXES) . . . APPELLANT ;

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AND

March 15. THE GRANGE TRUST, LIMITED . . . RESPONDENTS.

Revenue—Income Tax—Relief—Expenses of Management—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), s. 33, sub-s. 1, proviso (a).

By s. 33, sub-s. 1, of the Income Tax Act, 1918: "Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Sch. D, the company or bank shall be entitled to repayment of

* *Present* : LORD ATKIN, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that—(a) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules”—

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Held, that proviso (a) applies only to cases in which the Crown has power to tax under Case I. and, alternatively, under some other Case of Sch. D. Therefore the proviso does not apply in the case of a company which is not carrying on a trade and is not chargeable under Case I. of Sch. D.

Observation of Lord Skerrington in the overruled case of *Rosyth Building and Estates Co. v. Rogers* 1921 S. C. 372 on this point approved in general.

Order of the Court of Appeal [1934] 2 K. B. 317 affirmed.

APPEAL from an order of the Court of Appeal (1), dismissing an appeal from an order of Finlay J. whereby the learned judge upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts affirmed the decision of the Commissioners.

The question was whether the limitation imposed by proviso (a) to s. 33, sub-s. 1, of the Income Tax Act, 1918 (2), upon the amount of relief from tax allowed by sub-s. 1 is applicable to the case of a company which is not carrying on a trade within the meaning of Case I. of Sch. D to the Act.

The facts are stated in the opinion of Lord Wright.

It was conceded by the Inspector of Taxes that the respondents had not, during any material time, been carrying on a trade, the profits of which were chargeable to income tax under Case I. of Sch. D.

The respondents claimed repayment of 573*l.* 10*s.* income tax paid by them on 2294*l.*, the amount of expenses of management. The Inspector of Taxes objected to the claim on the ground that the amount of tax paid by the respondents was less than the tax which would have been paid if the profits had been charged in accordance with the rules applicable to Case I. of Sch. D, and that s. 33, sub-s. 1, proviso (a), precluded the respondents' claim.

(1) [1934] 2 K. B. 317.

(2) Sect. 33, sub-s. 1, and

proviso (a) are set out in the headnote.

H. L. (E.) The Special Commissioners allowed the claim of the respondents, and their decision was in turn affirmed by ¹⁹³⁵ SIMPSON Finlay J. and by the Court of Appeal (Lord Hanworth M.R. ^{v.} THE GRANGE TRUST. and Slessor and Romer L.JJ.).

The Inspector of Taxes appealed to this House.

Feb. 25. *Sir Thomas Inskip A.-G.* and *R. P. Hills* for the appellant.

A. M. Latter K.C. and *J. H. Stamp* for the respondents.
Sir Thomas Inskip A.-G. replied.

Feb. 26. The House took time for consideration.

March 15. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Wright, and I entirely agree with it and have nothing to add. I am asked to say that my noble and learned friend Lord Tomlin also agrees with it.

LORD RUSSELL OF KILLOWEN. My Lords, I find myself in the same position, and have nothing to add to the opinion about to be read by my noble and learned friend Lord Wright.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT. My Lords, the question in this appeal is whether the respondents, who for purposes of this case are admitted (whether rightly or not need not be here considered) to be a non-trading company, are excluded by proviso (a) to s. 33, sub-s. 1, of the Income Tax Act, 1918, from the relief in respect of management expenses to which under s. 33, sub-s. 1, they are prima facie entitled; or, to state the question in another form, whether proviso (a) applies to non-trading companies.

It may be convenient to set out the material parts of s. 33, sub-s. 1, which are as follows:—

33.—(1.) Where an assurance company carrying on life

assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Sch. D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year :

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Provided that—

(a) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules ; and

(b) the amount of any fines, fees, or profits arising from reversions in the case of an assurance company, and, in the case of any other company or any such bank, the amount of any income or profits derived from sources not charged to tax, shall be deducted from the amount treated as expenses of management for the year ;

The section reproduced s. 14, sub-s. 1, of the Finance Act, 1915, which first gave relief in such cases. An ordinary trading company assessed on the balance of its profits and gains for the year under Sch. D, Case I., is entitled, in order to arrive at the balance, to an allowance for outlays incurred for the purpose of earning its profits : the companies or concerns enumerated in s. 33, sub-s. 1, whose income is in the main taxed by deduction, would be placed at a disadvantage if no allowance was made to them for management expenses.

The respondents are a limited company incorporated in 1926 : it is conceded for purposes of this case that they have been at all material times a company within the description in s. 33, sub-s. 1, as being a company "whose business consists mainly in the making of investments and the principal

H. L. (E.) part of whose income is obtained therefrom." Their income
 1935 has been almost entirely derived from shares and bonds of
 SIMPSON English and foreign companies and from interest on State
 V. and municipal loans and nearly the whole of these receipts
 THE GRANGE have been taxed by deduction. The greater part of these
 TRUST. receipts from investments have been chargeable under
 Lord Wright. Sch. D, but about 15 per cent. have been chargeable under
 Sch. C. During the material period the respondents have
 not been charged under Case I. of Sch. D; and it is conceded
 for purposes of this case that they are not chargeable under
 that Case.

The fiscal year in respect of which relief is claimed is 1931-32; the respondents' net income during that fiscal year amounted to 42,159*l.*: the actual receipts were almost entirely derived from the sources enumerated above, but there were in addition some other small items—namely, bank interest amounting to 20*l.* in all, separately assessed under Case III. of Sch. D, and certain underwriting commissions amounting to 200*l.*, which sum was assessed under Case VI. of Sch. D. The actual receipts from investments for the fiscal year, all of which were taxed at the source, came to 45,356*l.*, but from the sum of these and the other receipts there was deducted interest paid to the bank amounting to 3417*l.*, giving 42,159*l.* as the net figure of income.

The respondents' expenses of management for the same period came to 2294*l.* The respondents accordingly claimed under the section repayment of 573*l.* 10*s.* as being the tax on 2294*l.* at 5*s.* in the *£* of these expenses.

The appellant resisted this claim on the ground that it was barred by proviso (a). The respondents' taxed income for the previous fiscal year 1930-31 had amounted to 48,048*l.*: it has been found by the Commissioners that if the respondents' profits for 1931-32 had been assessed as profits of a trade under Sch. D, Case I., on the basis of no tax having been deducted at the source, the amount of tax which would have been paid for that year (which would have been, so it is said, assessed under the rules of Case I. as amended by s. 29 of the Finance Act, 1926, on the profits of the preceding

year) would have been a tax on 48,048*l.*, whereas the actual tax paid was tax on 42,159*l.* only. Hence, it was said, proviso (a) came into force so that no relief could be granted, because the tax that was paid was less than the tax which would have been paid under the rules of Case I. Such was the argument.

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In the case of a trading company which comes within the terms of s. 33, sub-s. 1, the Crown has an option where more than one case of Sch. D is applicable, to elect to tax under the case which is most advantageous to it, though the Crown cannot elect as between different schedules: *Fry v. Salisbury House Estate, Ltd.* (1) An illustration of the Crown's right to elect between cases of Sch. D is furnished by *Liverpool and London and Globe Insurance Co. v. Bennett* (2), where it was held by this House that in regard to an assurance company the Crown could elect to tax under Sch. D, Case I., interest collected abroad even though not received in this country: the company was a trader and the interest on its invested funds was a part of the profits of its business, because these investments were made in the ordinary course of its business as an insurance company and for the purpose of that business. In such a case the company might come within s. 33, sub-s. 1, provided that it had not in fact been taxed in respect of any of its profits in that year under the rules of Case I., and hence in proper cases proviso (a) would apply to it. Even in a case where the profits of the company had been in fact charged under some other Case of Sch. D, yet as the particular profits might have been assessed under Case I., it would in these conditions be easy to calculate what tax it would have paid if it had been charged under the rules of Case I. Such an assessment may be described as a notional assessment.

But a different state of things arises where, as in the present case, the company though answering one of the descriptions contained in s. 33, sub-s. 1, is not a trading company. Since it is a non-trading company, the Crown has no option to assess it, under Case I. or the rules of that

(1) [1930] A. C. 432.

(2) [1913] A. C. 610.

H. L. (E.) Case : it can only be taxed normally by deduction in respect of its invested funds under whatever other cases of Sch. D are appropriate, that is one or other of Cases III., IV. or V. or under Sch. C ; if it has also some other receipts, these will generally be taxed under the relevant Cases or Schedules. Case I. is limited to profits of a trade and the respondents *ex hypothesi* carry on no trade. Hence it follows that what is called the "notional assessment," if it can be made at all, must be something which not only had not in fact been made, but could not ever according to Income Tax law have been made at all : the respondents could not legally be charged in accordance with the rules of Case I. of Sch. D nor could they ever pay any tax under these rules. Not only has the actual tax paid been outside the rules of Case I., but the Crown has never been entitled to elect to assess under these rules. It would seem therefore that while the respondents have a right *prima facie* to the benefit of s. 33, sub-s. 1, that right is not affected by proviso (a), which by its very terms can only be applied to a case in which, if the Crown had so elected, tax could have been paid and charged under the rules of Case I. In my opinion proviso (a) in its true construction is restricted to cases where tax would have been paid in fact under a legal assessment. The postulated assessment is one which is not only notional as regards the fact, but as regards the legal possibility.

The appellant contends for a different construction : he contends that proviso (a) on its true construction requires a "notional assessment" even though the income is not taxable under Case I., an assessment in which all the receipts are deemed to be profits of a trade and the balance is to be arrived at by some computation of allowances corresponding as far as possible to the allowances under the rules applicable to Case I. of Sch. D. But I do not think the words of proviso (a) are susceptible of such a construction. The word "profits" in s. 33, sub-s. 1, clearly means trade "profits" chargeable under Case I. and I think in proviso (a) "profits" must have the same meaning. But furthermore clear words would in my opinion be necessary to justify a fictitious

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assessment so arbitrary and so far removed from the provisions of the Income Tax law. This construction would mean rewriting Case I. so that Case I., which is limited expressly to trades, should be notionally applied to what is not a trade at all; but, even if that were done, it would be impossible to apply in the notional assessment the rules which are applicable to Cases I. and II. Thus Rule 1 of these rules prescribes that tax shall be charged "without any other deduction than is by this Act allowed." Rule 3 says that no sums shall be deducted unless for "money wholly and exclusively laid out or expended for the purposes of the trade"; this express limitation to "the trade" is repeated in respect of all the allowances permitted under that Rule. I need not give further instances to show that the rules applicable to Case I. cannot be applied as they stand to the receipts of non-traders, such as the respondents. But there is nothing in proviso (a) to provide that the rules are to be applied with necessary modifications or that they are to be applied to income to which not only is Case I. of Sch. D inapplicable, but as to some parts of which, for instance, that falling within Sch. C, even Sch. D is inapplicable. In the absence of clear and express words to justify the course for which the appellant contends, I think he must fail. It is a recognized rule in the construction of the Income Tax Acts that taxation cannot be imposed by analogy or by implication or by any sort of *cy-près* doctrine: the same rule equally applies to the construction of a provision like proviso (a), which is directed to excluding the enjoyment of a relief from taxation given by the section, unless the proviso applies.

In my opinion the construction put forward by the appellant cannot be accepted. It is retorted on his behalf that the respondents' construction involves reading in words which are not there. Thus, it is said, on that construction proviso (a) must be read as if its words were "paid if the profits had been (chargeable and) charged." I do not agree with this argument because I think, as I have already said, that the actual language of the proviso on its true construction can

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H. L. (E.) only refer to the case of profits capable of being brought
 1935 within Case I. ; but I may observe that the sense which the
 SIMPSON appellant seeks to impose on the proviso involves a substantial
 v. THE GRANGE rewriting of its language, somewhat to this effect : " less than
 TRUST. the tax which would have been payable if the receipts had
 Lord Wright. been deemed to be profits chargeable under the rules modified
 so as to apply as far as possible to such receipts, and had
 been charged accordingly." I certainly cannot extract any
 such meaning from the words as they stand. And I cannot
 help protesting against the idea of a " notional assessment " which not only would confuse Case I. with the other cases of Sch. D but would also overleap the bounds between the different Schedules and, as in this case, confuse Sch. D with Sch. C. Proviso (a) on its true construction is, in my opinion, limited to cases where an assessment under Case I. of Sch. D, though not made in fact, could properly have been made under the Income Tax Law. If words have to be read into proviso (a) it is much simpler to read in the word " chargeable," as Romer L.J. suggests, than to rewrite the proviso as the appellant's construction requires. But for myself, I find the words sufficient as they are.

This conclusion is sufficient to dispose of the appeal, which after all depends simply on the construction of proviso (a). I think it unnecessary to discuss some further matters which were mooted in argument but do not help a decision on the real point.

I should, however, add that the difficulties felt by Romer L.J. would, I think, disappear if it were remembered that a company like the respondents, whose business is mainly in the making of investments, may have some sources of income taxable by direct assessment, for instance under Sch. A or Sch. B, or under Case VI. of Sch. D : these pieces of income would be subject to appropriate taxation, like the bank interest and underwriting profits received by the respondents. And if they had trading profits in respect of which they were actually taxed under Case I. of Sch. D, s. 33, sub-s. 1, would by its very terms not apply at all. It is clear that a concern may be taxed in respect of different

parts of its income under different Schedules or Cases: see, *H. L. (E.)* for instance, *Fry v. Salisbury House Estate, Ltd.* (1)

It is not necessary to refer to *Rosyth Building and Estates Co. v. Rogers* (2), which cannot be regarded as law in view of what was said in *Fry v. Salisbury House Estate, Ltd.* (1), even though the observation of Lord Skerrington in reference to proviso (a) is, abstracted from its application in that case, correct.

In my opinion the conclusions of the Commissioners, of Finlay J., and of the Court of Appeal were right.

I think the appeal should be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, March 15, 1935.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *Clifford-Turner & Co.*

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[HOUSE OF LORDS.]

VAN DEN BERGHS, LIMITED . . . APPELLANTS; *H. L. (E.)**

AND

CLARK (INSPECTOR OF TAXES) RESPONDENT.

1935
April 8.

Revenue—Income Tax—Agreement between Trade Rivals—Sum paid to terminate—Capital or Profits of Trade—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case 1.

An English company with an issued share capital of 3,575,000*l.*, carried on a very extensive business as manufacturers of margarine and other substitutes for butter. Their articles of association empowered them to act in many subsidiary capacities such as those of importers, dealers, cattle breeders, crushers and merchants of seeds, shipowners, warehousemen and others; and also to enter into trading arrangements with persons engaged in any enterprises which the company was authorized to carry on. Their principal

(1) [1930] A. C. 432.

(2) 1921 S. C. 372.

* *Present*: LORD ATKIN, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

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trade rivals in the manufacture of margarine were a Dutch company.

In February, 1908, these two companies entered into an agreement to share profits and losses in the proportion which, on an average of five years, the profits of the rival tradings in margarine bore to each other. In July, 1913, the former agreement was extended so as to include profits and losses in connection with the acquisition and exercise of certain patent rights granted for a process of hardening oils and, with this extension, was prolonged until the end of 1940. Each company carried on its business independently and acted on the two agreements until the end of 1913. During the War the agreements could not be observed on either side. In October, 1920, a third agreement was entered into by which the former agreements were amended and it was agreed that, as amended, they should continue in force until the end of 1940. In particular it was agreed that the results of trading in the year 1914 and later years should be ascertained by accountants on each side, and that any dispute arising under the agreements should be settled by arbitration. Disputes arose and became the subject of an arbitration of such complexity and duration that the companies came to terms by which the agreements were rescinded and the Dutch company paid the English company a sum of 450,000*l.* "as damages"; but the parties did not specify the cause of action in respect of which the damages were paid:—

Held, that this sum was in the nature of a capital asset and not an income receipt to be included in computing the profits of trade of the English company under Sch. D, Case I, of the Income Tax Act, 1918.

Order of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal dated June 28, 1934, allowing an appeal by the Inspector of Taxes from an order of Finlay J. in the King's Bench Division made upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question at issue in this appeal was whether a sum of 450,000*l.* received by the appellants from Anton Jurgens Vereenigde Fabrieken of Holland (hereinafter called "the Dutch Company") was an income receipt to be included in the computation of the profits of the appellant's trade, or whether it was a capital receipt to be excluded from the operation of the Income Tax Act.

The Special Commissioners held that the said sum must be brought into account in arriving at the balance of the profits and gains of the appellants for the year in question.

At the instance of the appellants a special case was stated under s. 149 of the Income Tax Act, 1918. On the hearing of the special case Finlay J. reversed the determination of the Special Commissioners. The Inspector of Taxes appealed. The Court of Appeal (Lord Hanworth M.R., and Slesser and Romer L.JJ.) allowed the appeal and restored the determination of the Special Commissioners.

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—

Hence this appeal.

The facts, which were very voluminous, are summarized in sufficient detail in the speech of Lord Macmillan and are briefly indicated in the headnote.

March 4. *Sir William Jowitt K.C., A. M. Latter K.C., and Cyril L. King* for the appellants.

March 5. *Sir Thomas Inskip A.-G., Sir Donald Somervell S.-G. and R. P. Hills* for the respondent.

March 8. *A. M. Latter K.C.* replied.

The House took time for consideration.

April 8. LORD ATKIN. My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan. I agree with it, and have nothing to add.

LORD TOMLIN. My Lords, I also have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Macmillan, and I concur in it in all respects and have nothing to add.

LORD MACMILLAN. My Lords, in the year 1927 the appellants received payment of a sum of 450,000*l.* from Anton Jurgens Vereenigde Fabrieken of Holland (whom I shall call "the Dutch Company") pursuant to the terms of an agreement between the appellants and the Dutch Company dated September 24, 1927. The question is whether this sum ought to be taken into account in computing the balance of the

H. L. (E.) profits or gains of the appellants' trade for the year 1927
 1935 on which they are chargeable to tax for the year 1928-29
 VAN DEN under Sch. D of the Income Tax Act, 1918.
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 ———
 Lord
 Macmillan.
 ———

The appellants say that the 450,000*l.* was a capital receipt and ought not to be reckoned as forming any part of the profits arising from the carrying on of their trade. The Crown says that the 450,000*l.* was a trade receipt which ought to be included in the computation of the appellants' profits or gains for income tax purposes.

The circumstances in which the appellants received the payment which has now to be examined are set out in the stated case, from which I select the salient facts.

The appellants were incorporated as a limited company in this country in 1895 and have since carried on the business of manufacturing and dealing in margarine and similar products on a very extensive scale both here and abroad. They had as their keenest competitors the Dutch Company, which was engaged in the same business in Holland. On February 13, 1908, the two companies entered into an agreement whereby they bound themselves for the future to "work in friendly alliance" and to share their profits and losses in conformity with an elaborate scheme detailed in the agreement. Each of the two companies had a controlling interest in a number of other companies and they undertook that, if either of them or any of the companies which they controlled should acquire an interest in any other margarine concern, the fact should be communicated to the other party, who should have an option to require that interest to be brought within the operation of the agreement. Both companies further undertook on behalf of themselves and of their controlled companies not to enter into any pooling or price arrangements with third parties which might be deemed inimical to the interests of the two companies under the agreement. The directors and managers of the respective companies were parties to the agreement and bound themselves for twenty years not to engage in any margarine business other than that of the two companies. Provision was also made for the setting up of a representative joint committee which was

empowered to make arrangements with outside companies and firms as to the selling and buying prices of margarine and the limitation of areas of supply. It was further comprehensively agreed that "each of the two companies shall be true and loyal to the other of them and shall do all in the power of such company to promote the commercial, technical, pecuniary, buying and selling and other interests of the parties hereto in relation to the margarine business." It is not necessary to set out the detailed provisions of the agreement, but its elaborate character is sufficiently indicated by the fact that it consists of 35 articles (with numerous sub-heads) and five schedules and extends to 22 pages of print in the case before your Lordships.

A supplemental agreement was entered into between the parties on July 17, 1913, which recited that the Dutch Company had acquired rights in a process for hardening oils and that the parties were desirous of formulating a scheme for the merger of their assets or the unification of their financial and commercial interests and for the regulation and allocation of their turnover, but that such a scheme could not at present be fully elaborated to their satisfaction, and it was desirable in the meantime to regulate their mutual relations and modify and extend the principal agreement in the manner provided in the supplemental agreement. By this second agreement the parties modified the original basis of ascertaining and sharing profits and subject thereto agreed to continue in force the relative provisions of the principal agreement until December 31, 1940. Provision was made for the formation of a committee to endeavour to devise the scheme of merger or unification mentioned in the recital, and, failing agreement upon such a scheme by December 15, 1913, the parties bound themselves to execute a contract confirming and extending to December 31, 1940, the provisions of the supplemental agreement and of a scheduled document setting out agreed alterations in their existing pool contract.

According to the stated case "each company carried on its business independently, but in general the parties observed the terms of the said agreements for each of the years 1908

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H. L. (E.) to 1913 and the profits of the two companies were accounted for for those years. Payments were in fact made by and to the appellants under the said agreements in these years. The payments made to the Dutch Company were deducted as an expense and those made by the Dutch Company were brought in as a receipt in making up the appellants' profit and loss accounts for the years in which the payments were made or received. In computing the appellants' income tax liability for the said years the amounts of such payments or receipts were deducted or brought into the taxable profit respectively, and the income tax was paid accordingly. It was also agreed by the appellants, when liability for income tax and excess profits duty was under consideration for years subsequent to 1913, that the results of working the said agreements should be charged to income tax and excess profits duty as trading receipts and payments."

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During the war the two companies did not operate the agreements, and after peace was restored they found it desirable to enter into a fresh agreement in an endeavour to render workable the two previous agreements which were then running and would not terminate till 1940. This third agreement, which was dated October 15, 1920, recited that some of the provisions of the previous agreements had become obsolete or impracticable. It then proceeded to provide that, subject to the amendments and additions thereby effected, the principal agreement should remain in force till December 31, 1940. Further provision was made for the mutual communication of information relating to manufacturing processes, the basis of the ascertainment and division of profits was modified, the branches of business embraced were extended, and various other matters were regulated. As in the case of the two previous agreements, all disputes were referred to arbitration.

Meantime the appellants had been endeavouring to estimate the sum which they believed had accrued due to them by the Dutch Company over the war period. After various tentative calculations they brought out in 1922 a sum of 449,042*l.*, which they alleged was owing to them. The Dutch

Company disputed this figure and claimed that on the contrary the appellants were on balance indebted to them. The matter went to arbitration in 1925. The proceedings dragged on inconclusively at "prodigious" (1) expense until in 1927 the parties came to an arrangement which was embodied in three agreements all dated September 24, 1927.

By the first of these agreements the members of the Jurgens family and the members of the Van den Bergh family agreed to consolidate their respective interests in a Dutch holding company and an English holding company on the terms therein mentioned.

By the second of these agreements each party withdrew all claims against the other party under the agreements of 1908, 1913 and 1920 for the years 1914 to 1927 inclusive, and both parties mutually discharged each other from any liability arising thereunder before December 31, 1927. Each party further undertook to do everything necessary to put an end to the arbitration.

The third of these agreements recited that the Dutch Company had expressed to the appellants a desire to determine the agreements of 1908, 1913 and 1920 contrary to the provisions therein contained, and that the appellants had consented thereto in consideration of the payment to them by the Dutch Company of 450,000*l.* "as damages." This agreement consists of two articles only. By the first article the parties agreed that the three agreements of 1908, 1913 and 1920 should be thereby determined as from December 31, 1927, and each party released the other party from all claims thereunder. By the second article the Dutch Company undertook forthwith to pay to the appellants a sum of 100,000*l.* and to hand to them promissory notes for a further sum of 350,000*l.* payable as therein stated. In point of fact the total sum of 450,000*l.* was paid in cash by the Dutch Company to the appellants before the expiry of the year 1927. This is the sum in dispute in the present appeal.

The Special Commissioners held that "the 450,000*l.* was paid in respect of the pooling agreements and must be brought

(1) The words used in para. 11 of the special case.

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H. L. (E.) in for the purpose of arriving at the balance of profits and gains of the appellants for the year ending December 31, 1927." That is their sole finding; it is not informative, for everyone agrees that the sum in question was paid "in respect of the pooling agreements," but there can be no doubt, if regard be had to the contentions submitted to them, that the Commissioners' view was that the sum in question was an income receipt.

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Finlay J. reversed the determination of the Special Commissioners, and held that the agreements which were cancelled were "a capital asset" of the appellants and that the 450,000*l.* was "not an income receipt at all." The Court of Appeal unanimously reversed this judgment and restored the determination of the Special Commissioners, holding that the sum was not received by the appellants in consideration of the surrender of a fixed capital asset but arose from a transaction attributable to circulating capital, and was consequently an income receipt.

My Lords, the problem of discriminating between an income receipt and a capital receipt and between an income disbursement and a capital disbursement is one which in recent years has frequently engaged your Lordships' attention. In general the distinction is well recognized and easily applied, but from time to time cases arise where the item lies on the borderline and the task of assigning it to income or to capital becomes one of much refinement, as the decisions show. The Income Tax Acts nowhere define "income" any more than they define "capital"; they describe sources of income and prescribe methods of computing income, but what constitutes income they discreetly refrain from saying. Nor do they define "profits or gains"; while as for "trade," the "interpretation" section of the 1918 Act only informs us, with a fine disregard of logic, that it "includes every trade, manufacture, adventure or concern in the nature of trade." Consequently it is to the decided cases that one must go in search of light. While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording

indications of the kind of considerations which may relevantly be borne in mind in approaching the problem. H. L. (E.)

The reported cases fall into two categories, those in which the subject is found claiming that an item of receipt ought not to be included in computing his profits, and those in which the subject is found claiming that an item of disbursement ought to be included among the admissible deductions in computing his profits. In the former case the Crown is found maintaining that the item is an item of income; in the latter, that it is a capital item. Consequently the argumentative position alternates according as it is an item of receipt or an item of disbursement that is in question, and the taxpayer and the Crown are found alternately arguing for the restriction or the expansion of the conception of income.

I propose to refer first to the case of *British Insulated and Helsby Cables, Ltd. v. Atherton*. (1) This case has been generally recognized as the leading modern authority on the subject, though I fear that Romer L.J. was unduly optimistic when he said that it "placed beyond the realms of controversy" the law applicable to the matter: *Anglo-Persian Oil Co. v. Dale*. (2) The facts were that the appellant company claimed to deduct in the computation of its trade profits a sum which it had provided to form the nucleus of a pension fund for its employees. The Crown argued that the sum ought to be debited to capital on the ground that it "was not in its nature recurrent but was made once for all" and that it was a case of the "provision of a capital sum which will for ever after relieve the company from making any further payment whatsoever." This argument prevailed. The Lord Chancellor (Viscount Cave) found in the decisions "considerable authority" for the view which he recommended to the House to adopt—namely, that "when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade . . . there is very good reason (in the absence of special circumstances leading to an opposite

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(1) [1926] A. C. 205.

(2) [1932] 1 K. B. 124, 145.

H. L. (E.) conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." (1) Lord Atkinson (2) indicated that the word "asset" ought not to be confined to "something material" and, in further elucidation of the principle, Romer L.J. has added that the advantage paid for need not be "of a positive character" and may consist in the getting rid of an item of fixed capital that is of an onerous character: *Anglo-Persian Oil Co. v. Dale*. (3)

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My Lords, if the numerous decisions are examined and classified, they will be found to exhibit a satisfactory measure of consistency with Lord Cave's principle of discrimination. Certain of them relate to excess profits duty and not to income tax, but for the present purpose this distinction is immaterial. A sum provided to establish a pension fund for employees, as has already been seen, is a capital disbursement: *British Insulated and Helsby Cables, Ltd. v. Atherton* (4); so is a sum paid by a coal merchant for the acquisition of the right to a number of current contracts to supply coal: *John Smith & Son v. Moore* (5); so is a payment by a colliery company as the price of being allowed to surrender unprofitable seams included in its leasehold: *Mallett v. Staveley Coal & Iron Co.* (6) Similarly a sum received by a fireclay company as compensation for leaving unworked the fireclay under a railway was held to be a capital receipt: *Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue*. (7)

On the other hand, a sum awarded by the War Compensation Court to a company carrying on the business of brewers and wine and spirit merchants in respect of the compulsory taking over of its stock of rum by the Admiralty was held to be a trade or income receipt: *Commissioners of Inland Revenue v. Newcastle Breweries, Ltd.* (8); so was a sum paid to a shipbuilding company for the cancellation of a contract to build a ship: *Short Brothers, Ltd. v. Commissioners*

(1) [1926] A. C. 213, 214.

(2) Ibid. 222.

(3) [1932] 1 K. B. 146.

(4) [1926] A. C. 205.

(5) [1921] 2 A. C. 13.

(6) [1928] 2 K. B. 405.

(7) 1922 S. C. (H. L.) 112.

(8) (1927) 12 Tax Cas. 927.

of *Inland Revenue* (1) ; so was a lump sum payment received by a quarry company in lieu of four annual payments in consideration of which the company had relieved a customer of his contract to purchase a quantity of chalk yearly for ten years and build a wharf at which it could be loaded : *Commissioners of Inland Revenue v. Northfleet Coal and Ballast Co.* (2) ; so was a sum recovered from insurers by a timber company in respect of the destruction by fire of their stock of timber : *J. Gliksten & Son v. Green.* (3) Conversely, where a company paid a sum as the price of getting rid of a life director, whose presence on the board was regarded as detrimental to the profitable conduct of the company's business, the payment was held to be an income disbursement : *Mitchell v. R. W. Noble, Ltd.* (4) ; so was the payment made in the case of the *Anglo-Persian Oil Co. v. Dale* (5) in order to disembarass the company of an onerous agency agreement. There are further instances in the reports, but I have quoted enough for the purposes of illustration.

With the guidance thus afforded I now address myself to the question whether the 450,000*l.* received by the appellants in the circumstances already narrated can properly be described as an item of profit arising or accruing to them from the carrying on of their trade, which ought to be credited as an income receipt. It is important to bear in mind at the outset that the trade of the appellants is to manufacture and deal in margarine, for the nature of a receipt may vary according to the nature of the trade in connection with which it arises. The price of the sale of a factory is ordinarily a capital receipt, but it may be an income receipt in the case of a person whose business it is to buy and sell factories.

My Lords, the learned Attorney-General stated that he was content to take the agreements of 1927 as meaning what they say. The sum of 450,000*l.* is accordingly to be taken as having been paid by the Dutch Company to the appellants in consideration of the appellants consenting to the agreements

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(1) (1927) 12 Tax Cas. 955.

(3) [1929] A. C. 381.

(2) (1927) 12 Tax Cas. 1102.

(4) [1927] 1 K. B. 719.

(5) [1932] 1 K. B. 124.

H. L. (E.) of 1908, 1913 and 1920 being terminated as at December 31, 1927, instead of running their course to December 31, 1940. If the payment had been in respect of a balance of profits due to the appellants by the Dutch Company for the years 1914 to 1927, different considerations might have applied, but it is agreed that it is not to be so regarded.

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Now what were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated case "pooling agreements," but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily itself an item of income. As Lord Buckmaster pointed out in the case of the *Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue* (1): "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of, so fundamental an organization of a trader's activities can be regarded as an income disbursement

or an income receipt. Mr. Hills very properly warned your Lordships against being misled as to the legal character of the payment by its magnitude, for magnitude is a relative term and we are dealing with companies which think in millions. But the magnitude of a transaction is not an entirely irrelevant consideration. The legal distinction between a repair and a renewal may be influenced by the expense involved. In the present case, however, it is not the largeness of the sum that is important but the nature of the asset that was surrendered. In my opinion that asset, the congeries of rights which the appellants enjoyed under the agreements and which for a price they surrendered, was a capital asset.

I have not overlooked the criterion afforded by the economists' differentiation between fixed and circulating capital which Lord Haldane invoked in *John Smith & Son v. Moore* (1) and on which the Court of Appeal relied in the present case, but I confess that I have not found it very helpful. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital is not involved directly in that process, and remains unaffected by it. If this is to be the test, I fail to see how the appellants could be said to have been engaged in turning over the asset which the agreements in question constituted. The agreements formed the fixed framework within which their circulating capital operated; they were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself. They provided the means of making profits, but they themselves did not yield profits. The profits of the appellants arose from manufacturing and dealing in margarine.

For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed with costs and the judgment of Finlay J. restored.

LORD WRIGHT. My Lords, I am in full agreement with the opinion which has just been delivered by my noble and learned friend Lord Macmillan, and I have nothing to add.

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H. L. (E.) LORD ATKIN. My Lords, I have been asked by my noble and learned friend Lord Russell of Killowen to say that he has read the opinion which has just been delivered, and that he agrees with it.

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Cyril King asked their Lordships for a direction as to the rate of interest which should be paid upon the tax now repayable to the appellants under the judgment of the House, explaining that down to the date of the order of the Court of Appeal, June 28, 1934, payment and repayment of the tax had carried interest at 4 per cent. ; but that lately, on April 5, Finlay J. had made an order for payment of tax with interest at $3\frac{1}{2}$ per cent.

LORD ATKIN. On this occasion the rate of interest should be 4 per cent. The House is not laying down any general rule. This direction is given simply because in this particular case on other occasions that is the rate at which interest has been paid.

Order of the Court of Appeal complained of reversed and judgment of Finlay J., thereby set aside, restored : Ordered that the respondent do pay the appellants the costs incurred by them in the Court of Appeal and repay to the appellants the amount of the tax paid by them to the respondent together with interest thereon at the rate of 4 per centum per annum as from July 1, 1932, to March 22, 1934, inclusive, and also as from July 20, 1934 : Further ordered that the respondent do pay to the appellants the costs incurred by them in respect of the appeal to this House : Further ordered that the cause be remitted back to the King's Bench Division of the High Court of Justice, to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 8, 1935.

Solicitors for appellants : Gouldeu, Mequita & Co. *Leitch*
Solicitor for respondent : The Solicitor of Inland Revenue.

[HOUSE OF LORDS.]

ASSAM RAILWAYS AND TRADING COMPANY, LIMITED	} APPELLANTS ;	H. L. (E.)* 1934 July 24.
AND		
THE COMMISSIONERS OF INLAND REVENUE	} RESPONDENTS.	

Revenue—Income Tax—English Company—Business carried on in India—United Kingdom Income Tax—Dominion Income Tax—Relief from United Kingdom Income Tax—"Part of Income" on which Dominion Income-Tax has been paid—Sums paid as Interest on Debentures—Profits of Tea Garden—Exemption in India—Chargeability in United Kingdom—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case I.—Finance Act, 1920 (10 & 11 Geo. 5, c. 18), s. 27—Finance Act, 1927 (17 & 18 Geo. 5, c. 10), s. 46, Sch. V, Part II, s. 2—Royal Commission—Report—Statute adopting recommendations—Report inadmissible as guide to construction of Statute.

By s. 27, sub-s. 1, of the Finance Act, 1920: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined" as therein provided.

A company, incorporated in England and controlled by a board of directors in England, carried on its business and derived all its income from its business in India, and was assessed thereon to United Kingdom income tax and to Dominion income tax. The company had issued certain debenture stocks. Part of its profits arose from cultivating and managing a tea garden in Assam. Neither the amount paid as interest on the debenture stocks nor the profits from the tea garden were charged to Dominion income tax. The whole of the Company's income was charged to United Kingdom income tax under Sch. D, Case I. It was assessed to Dominion income tax in a sum of 129,365*l.* and to United Kingdom income tax in a sum of 186,750*l.* :—

Held, that the Company was entitled to relief from United Kingdom income tax at the prescribed rate on 129,365*l.*, that being the part of its income on which it had paid Dominion income tax; but not on 186,750*l.*, although it had been taxed on its whole income chargeable to tax in India.

* *Present* : LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD WRIGHT.

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On a question of the true construction of an Income Tax Act a report of a Royal Commission containing certain recommendations, *held* not admissible to show the purpose or object of the Legislature in passing the Act, although it appeared to adopt the recommendations.

Dictum of Farwell L.J. in *Rex v. West Riding of Yorkshire County Council* [1906] 2 K. B. 676, 717, approved.

Dictum of Lord Halsbury L.C. in *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade-Marks* [1898] A. C. 571, 575, distinguished.

Order of the Court of Appeal [1933] 2 K. B. 576 affirmed.

APPEAL from an order of the Court of Appeal (1) dismissing an appeal from an order of Finlay J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax upon a claim by the Assam Railways and Trading Company for relief from United Kingdom income tax under s. 7, sub-s. 1, of the Finance Act, 1920, as amended by s. 46 of the Finance Act, 1927, and Part II., s. 2 (i), of the Fifth Schedule to that Act. (2)

The Assam Railways and Trading Company (hereinafter called "the Company") was and is a joint stock company incorporated and resident in England with an authorized share capital of 1,160,000*l.*, the whole of which has been issued. It has issued in the United Kingdom 500,000*l.* 4½ per cent. mortgage debenture stock and 400,000*l.* 5 per cent. debenture stock. The interest paid on these debenture stocks for each of the years in question amounted to 42,500*l.*

The Company carry on a composite business in Assam,

(1) [1933] 2 K. B. 576.

(2) Finance Act, 1920, s. 27, sub-s. 1, as amended by the Finance Act, 1927, s. 46, and Sch. V., Part II., s. 2 (i) : "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid

or payable by him on that part of his income at a rate thereon to be determined as follows :—

"(a) If the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom income tax, the rate at which relief is to be given shall be the Dominion rate of tax :

"(b) In any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom income tax."

where their undertaking comprises a railway, coal mines, timber forests, saw mills, brick works, and a tea plantation. With the exception of taxed dividends on certain English investments and interest on money on deposit in England, the whole of the Company's income for the two years ending on April 5 in 1929 and 1930 respectively arose in India and had been charged to United Kingdom income tax as profits of trade under Case I. of Sch. D to the Income Tax Act, 1918. The Company claimed relief under s. 27 of the Finance Act, 1920, for a number of years, but the two years mentioned above were chosen as raising a question common to these and to the other years of claim.

The Company was charged to Dominion income tax under the Indian Income Tax Act, 1922, in respect of its profits and gains. By s. 10, sub-s. 2, of that Act those profits and gains were to be computed after making an allowance “(iii.) in respect of capital borrowed for the purposes of the business, where the payment of interest is not in any way dependent on the earning of profits.” The allowance was the amount of interest paid. Consequently in computing the profits of the Company for assessment to Indian income tax a deduction of 42,500*l.* was allowed; but no such allowance was made in computing their profits for assessment to United Kingdom income tax under Case I. of Sch. D of the Income Tax Act, 1918.

Secondly, part of the Company's undertaking consisted of a tea garden known as the Bogapani Tea Garden. In computing the Company's profits for assessment to Dominion income tax, the difference between the amount realized by sales and the amount expended in maintenance was excluded; but in computing the Company's profits for assessment to United Kingdom income tax this balance was included.

As the result of these different methods of assessment the assessment to United Kingdom income tax for the year 1928-29 was 186,808*l.*, while the assessment to Dominion income tax was 129,365*l.*

The Company claimed relief at the rate of 2*s.* in the pound from United Kingdom income tax on the above mentioned

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H. L. (E.) sum of 186,808*l.*, less a deduction of 58*l.* for transfer fees, in all 186,750*l.* The Commissioners of Inland Revenue refused this claim on the ground that the Company was only entitled to relief on 186,750*l.* less 42,500*l.*, the amount of debenture interest paid by the Company, and less a sum of 8343*l.* representing the excess of receipts over expenses of the Bogapani Tea Garden; that is to relief on 135,907*l.* (1)

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The Commissioners for the Special Purposes of the Income Tax Acts affirmed the decision of the Commissioners of Inland Revenue, but stated a case for the opinion of the King's Bench Division upon the question "Whether, in computing the amount on which relief is due to the Company under s. 27 of the Finance Act, 1920, in respect of Indian income tax, the interest on the debenture stocks and the Bogapani Tea Garden item as adjusted are to be deducted."

The special case was heard before Finlay J., who affirmed the decision of the Special Commissioners. The Company appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) affirmed the decision of Finlay J. and dismissed the appeal.

The Company then appealed to this House.

June 12. *A. M. Latter K.C.* and *Cyril L. King* for the appellants. The question in this appeal arises upon the words "any part of his income" in s. 27, sub-s. 1, of the Finance Act, 1920, as amended by s. 46 and Sch. V., Part II., sub-s. 2 (i), of the Finance Act, 1927. The section provides that "If any person who has paid . . . United Kingdom income tax for any year of assessment on any part of his income proves . . . that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid . . . by him on that part of his income" at the declared rate. It is common ground that the appellants, having paid income tax on their profits and gains as assessed first in India and then again in England, are entitled to some

(1) The amount actually taxed respondents were content to accept in India was 129,365*l.*, but the the figure of 135,907*l.*

relief, and that the rate at which relief is given is 2s. in every pound of that part in respect of which they have paid United Kingdom income tax and Dominion income tax. The question is, What is meant by "part" of their income? What are the boundaries and confines of the "part"? Are the parts of their income distinguished by the various departments of their business which produce respective amounts of profit; for example, Is the profit from the appellants' railway one part of their income; that from their coal mines another part, and so on? Or are the parts defined by the places where the income is earned? Is one part that which is earned in Bogapani, another that which is derived from some other district? Or does "part" of the income merely mean a component part in the sense in which twenty is part of a hundred? It is submitted that what distinguishes one part from another is the source from which it is derived: *Rolls Royce, Ltd. v. Short*. (1) In this case the source of the appellants' income was the Indian business of the Company. They have paid Dominion income tax on that part, in this case the whole, of their income and are entitled to relief in respect of 186,750*l.*, the amount at which they have been assessed to United Kingdom income tax in respect of the same part of their income.

Counsel proposed to cite in support of this contention certain recommendations contained in a report of the Royal Commission on Income Tax in 1920.

R. P. Hills for the respondents objected to the Report being referred to for the purpose of interpreting s. 27. The House upheld the objection.

Inland Revenue Commissioners v. Dalgety & Co. (2) was also cited.

Sir Thomas Inskip A.-G. and *R. P. Hills* for the respondents. The object of s. 27 of the Finance Act, 1920, is to relieve the taxpayer from double taxation. In the expression "on any part of his income" the word "part" has no technical meaning. It merely means "portion." The amount of their profits and gains which the appellants have paid as

(1) (1925) 10 Tax Cas. 59. (2) [1930] A. C. 527; 15 Tax Cas. 216.

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H. L. (E.) interest on their debenture stocks is part of their income.
 1934 So is the amount of profits and gains, that is the excess of
 ASSAM receipts over expenditure, from the Bogapani Tea Garden.
 RAILWAYS On that part of their income which consists of the sum of
 AND these two items they have not suffered double taxation, and
 TRADING therefore in respect of that part they are not entitled to relief.
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 COMMIS- *Latter K.C. replied.*
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The House took time for consideration.

July 24. LORD BLANESBURGH. My Lords, I have found that the more the question raised by this appeal is considered, the greater is the difficulty it presents. It is only after close examination that the ambiguities of s. 27, sub-s. 1, of the Finance Act, 1920, become apparent. The section suggests no serious problem when the "part" of the assessee's income brought into charge for the year of assessment to United Kingdom income tax is, in its amount, equal to "the same part" of his income brought into charge for the same year to Dominion income tax. Nor is the difficulty serious when the section has to be applied to a case in which the "part" of the assessee's income brought into charge for the purpose of Dominion income tax is, in its amount, greater than that brought into charge in the United Kingdom. The extent of the relief from United Kingdom income tax given by the section is in each of these cases not doubtful. The assessee in respect of the whole of the sum representing the "part" of his income which has been brought into charge in the United Kingdom is entitled to the relief given by the section, and that relief will operate to discharge him to the prescribed extent from the burden of a double taxation, one in the Dominion and the other in the United Kingdom.

So far, the relief granted is relief from a double taxation, and nothing more. The real difficulty of the section arises when it has to be ascertained, as in this instance it has, whether that still remains its purpose and result when its provisions have to be applied to a case in which the "part" of the assessee's income brought into charge for the purpose of Dominion

income tax is in amount less than that brought into charge in the United Kingdom. Is the section, in this case also, effective only to relieve the assessee from payment of double income tax to the prescribed amount and to the extent to which he would otherwise be required to make it? or is the section, in this instance alone, operative in quite a different way, so that, when the assessee has met every claim in respect of the "part" of his income charged to Dominion income tax, however small in amount that "part" may be, he is, by the section, relieved in respect of the whole amount, however large, which represents the same "part" of his income brought into charge in the United Kingdom? In other words, are the appellants here entitled, as they contend, to relief under the section in respect of the whole of their business income brought into charge in the United Kingdom irrespective of what is brought into charge in India, or, as the Attorney-General contends, only in respect of so much of that income as has been or will be charged to income tax there?

On this point I feel constrained, on consideration, to say that the actual language of the section is not unfavourable to the appellants' contention. Not advertng for the moment to the question whether the word "part" as used in the section does or does not connote a sum of money brought into charge both in the United Kingdom, and, in this case, in India, that word does certainly, I think, point to the source from which the income is derived, "the part" and "the same part" being brought in the section into relation with each other by their identity of source. The word appears to me to denote what may be described as a "compartment" of the assessee's total income, if I may select as a more pregnant term, one suggested by its similarity in sound. Then again, it is not, I think, unfavourable to the appellants' contention that, in order to entitle an assessee to relief, it is in terms enough that he has paid Dominion income tax "in respect of" that same "compartment" of his income. These words may be significant when it is seen that, while by the section it is not presupposed that the effective compartment must correspond

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H. L. (E.) in amount to the United Kingdom counterpart, rather the reverse, yet the extent of relief is, so far as words are concerned, expressed to be invariable. It is always relief at a prescribed rate "from United Kingdom income tax paid or payable by him on that part of his income." That is, may it not be said, from the whole of that tax.

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I have been moved by these considerations, which seem to me to have weight. But they are not to my mind final, nor do they, I think, outweigh the reasoning which leads to the conclusion that the section in every case where it has to be applied is really directed against a charge pro tanto of double income tax upon any portion of any "compartment" of the assessee's total income and that there is no sufficient indication in the language employed necessitating the conclusion that any further relief is contemplated or provided for.

Accordingly, while conscious of difficulty, I am ready to accept the construction in that sense placed upon the section by my noble and learned friends Lord Warrington of Clyffe and Lord Wright in their judgments, which I have had the advantage of reading and which I accept.

With them I agree that this appeal should be dismissed and I move your Lordships accordingly.

LORD WARRINGTON OF CLYFFE (read by LORD ATKIN). My Lords, this is an appeal from an order of the Court of Appeal (Lord Hanworth M.R. and Lawrence and Slesser L.JJ.) dated July 11, 1933, dismissing an appeal by the present appellants from an order of the King's Bench Division (Finlay J.) dated February 14, 1933, which affirmed a decision of the Special Commissioners upon a claim by the appellants for relief from United Kingdom income tax.

The question depends upon the true construction and effect, in the events which have happened, of s. 27 of the Finance Act, 1920. That section so far as it is material to the solution of the question is as follows:—

"(1.) If any person who has paid, by deduction or otherwise, . . . United Kingdom income tax for any year of assessment on

any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows :—”

There follow provisions for the determination of the rate as to which no question arises in the present case.

Sub-s. 8 contains the following definitions :—

“(b) The expression[s] ‘ United Kingdom income tax ’ means income tax chargeable in accordance with the provisions of the Income Tax Acts.

“(c) The expression ‘ Dominion income tax ’ means any income tax charged under any law in force in any Dominion, if that tax appears to the Special Commissioners to correspond with United Kingdom income tax.”

The Dominion income tax in the present case is that charged under the law of India, and there is no question that it falls within the above mentioned definition. The appellants are an English company incorporated and resident in England. They carry on a composite business in India. With some immaterial exceptions of trifling amount the whole of their income for the two years ending April 5, 1929, and April 5, 1930, arose in India and was charged to United Kingdom income tax as profits of trade under Case I. of Sch. D. The claim to relief was made in respect of several years, but the year ending April 5, 1929, may be taken as typical of the rest, and in fact has alone been the subject of actual decision in the Courts below.

The appellants were charged to United Kingdom income tax for that year on their profits from India with 186,750*l.* For the same year they were charged to Dominion income tax with 129,365*l.* only. The difference arises from the fact that in India certain debenture interest was allowed as a deduction from the gross profits, and the profits from certain tea gardens were excluded from the account. This course was not allowed in England.

There were other divergencies in the two systems of taxation which combined to make up a further excess of

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6542*l.* in the United Kingdom profits, which, when also so excluded, reduced the amount of 186,750*l.* to 129,365*l.*, the amount assessed to Indian income tax.

The Court of Appeal has held that on the true construction of the section relief from United Kingdom income tax can be allowed on 129,365*l.* only, that being in their opinion that part of the appellants' income in respect of which they have paid Dominion income tax. The question depends on the true construction of the section in question read of course in connection with and as part of the Income Tax as a whole, and in accordance with the usual rules of construction.

Counsel for the appellants indeed insisted that he was entitled to support his argument on construction by referring to the Report of the Royal Commission on Income Tax published in 1920. On this point I have read and considered the opinion about to be delivered by my noble and learned friend Lord Wright. With his opinion I concur and have nothing to add to what he has said.

On the question of construction the contention of the appellants was that "part of the income" refers only to the source from which the income is derived. The source in this case was the Indian business of the Company, and it was contended that, inasmuch as the whole of that income was taxed to United Kingdom income tax in the sum of 186,750*l.*, it is in respect of that sum that relief should be given.

I cannot agree with this contention. The word "part" is not in any sense a word of art with a peculiar meaning derived from the subject matter in connection with which it is used. We are here dealing with a sum of money referred to as income. "Part" of a sum of money means in its ordinary signification so many pounds, shillings and pence out of a larger amount. If the income is 100*l.* a smaller sum, say 50*l.*, would properly be described as a part thereof.

In the present case the part of his income on which the taxpayer has paid tax in England is 186,750*l.* In India he has paid tax on a smaller part numerically of the same income. To obtain relief he has to prove that he has paid Dominion tax on the same part of his income as that on which he paid

United Kingdom tax. He can only prove this in respect of the smaller sum. I can see no reason why for the purpose of identification any other meaning should be given to the word "part" than the numerical meaning. "Double taxation" is not in terms mentioned in the section, but it is obvious that the object of the provision is to obtain pro tanto the avoidance of that result. The taxpayer has paid Dominion income tax in respect of *xl.* of his income; he is entitled to relief in respect of *xl.* part of the same income and to no more.

Some criticism was directed to the use of "on" in relation to United Kingdom income tax and "in respect of" in relation to Dominion income tax, but I see no point in this; the two expressions mean virtually the same thing.

The case of *Rolls Royce Ltd. v. Short* (1) was referred to by the appellants' counsel, who relied upon certain observations of my own as supporting his present contention. I do not see that this is so. Those observations, which I have read, must be understood as referring to the case then before the Court, and so read they have no bearing on the present case. I may add, however, that I can detect in them no divergence between my own view and those of my learned brethren in the Court of Appeal.

The present case is a simple one. Others may arise in which further complications will have to be dealt with. That is no reason why the simple solution in the present case should not be the right one.

On the whole I agree with the conclusion of the Court of Appeal, and am of opinion that this appeal should be dismissed.

LORD ATKIN. My Lords, I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Wright, and I agree with it and with the opinion which I have just read.

LORD WRIGHT. My Lords, I am authorized by my noble and learned friend Lord Thankerton to say he agrees with the opinion which I am about to deliver.

(1) 10 Tax Cas. 59.

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H. L. (E.) The question to be decided in this appeal is what
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 ASSAM is the extent of relief in respect of income tax to which
 RAILWAYS the appellants are entitled under s. 27, sub-s. 1, of the Finance
 AND Act, 1920, as amended by s. 46 and the Fifth Schedule, Part II.,
 TRADING s. 2, sub-s. 1, of the Finance Act, 1927.
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 v. The facts are simple: the appellants are a joint stock
 COMMISSIONERS OF company incorporated and registered in England; their
 INLAND business is carried on in Assam and consists of running a
 REVENUE. railway, working coal mines, timber concessions and other
 Lord Wright. undertakings, including a tea plantation. Not the whole but
 almost the whole of their income for the two years which are
 here in question, having been taken as typical, i.e., the years
 ending on April 5, 1929, and April 5, 1930, arose in India.
 That income was duly charged to United Kingdom income
 tax under Case I. of Sch. D in the First Schedule of the
 Income Tax Act, 1918.

 It will be sufficient in order to illustrate the point at issue
 to take the figures for the year 1928-29. No difficulty arises
 in this case in comparing the figures for the United Kingdom
 tax and for the Indian tax respectively. In both assessments
 the computation of profits is based on those of the preceding
 year, the period taken in the accounts being that ending on
 March 31, 1928. A trifling sum 58*l.* was earned by the
 appellants in England for transfer fees: this having been
 deducted, the assessment of profits for income tax in the
 United Kingdom came out at 186,750*l.*; but the same profits
 were assessed to income tax in India at 129,365*l.* The
 appellants claimed relief at 2*s.* in the pound on the former sum:
 the Special Commissioners granted relief in respect of 135,907*l.*:
 the difference between the latter figure and 129,365*l.* is 6542*l.*
 The Court of Appeal in confirming (in substance) the ruling of
 the Special Commissioners, took the view (rightly as I think)
 that the true amount on which relief should be given was
 129,365*l.*, and I shall proceed on the basis of that figure,
 though no claim is made by the respondents to have the figure
 of 135,907*l.* altered.

 In effect the position is that the appellants have paid or
 become liable to pay United Kingdom income tax for the

year 1928-29 on an assessment on part of their income of 186,750*l.*; but in respect of the same income for the same year have paid in India on an assessment of 129,365*l.* The difference between the two assessments is in the main due to the fact that in India the sum of 42,500*l.* for debenture interest was allowed as a deduction from the tax, whereas in the United Kingdom no such deduction was allowed: in addition in India profits from a tea garden owned by the appellants, were for some reason not taken into account, whereas these profits were included in the profits under the United Kingdom assessment. As already indicated, there were other similar but minor differences in the assessments, which it is not necessary here to consider.

The rival contentions may be thus summarized. The appellants claim that though the Indian assessment is only at the figure of 129,365*l.*, it is an assessment on the whole amount of the profits of 186,750*l.*; in other words it exhausts the taxable capacity in India of the whole of those profits, so that the appellants have paid Indian income tax on the whole of that sum and hence are on that footing entitled to income tax relief under s. 27 of the Act of 1920 on the whole of that sum.

The respondents, on the other hand, contend that double income tax has only been paid on 129,365*l.* and no more, within the meaning of the section, and hence that it is only on that sum that relief is claimable.

The question, which is by no means free from difficulty, depends on the true construction of the words of the section, read in connection with the Income Tax Act as a whole and in accordance with the usual rules of construction.

Mr. Latter sought to introduce into his argument certain recommendations from a Report of a Royal Commission on Income Tax in 1920; he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them and hence they could be used to show what was the intention of the Legislature in enacting the section. It would, perhaps, in this case be sufficient ground for rejecting, as your

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Lordships did, this contention and refusing to look at the Report, that it had not been used or referred to either before the Special Commissioners or before Finlay J., or the Court of Appeal. But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of an Act is admissible; the intention of the Legislature must be ascertained from the words of the statute with such extraneous assistance as is legitimate: as to this I agree with Farwell L.J. in *Rex v. West Riding of Yorkshire County Council* (1), where he says "I think that the true rule is expressed with accuracy by Lord Langdale in giving the judgment of the Privy Council in the *Gorham Case* (2) in Moore, 1852 edition, p. 462. 'We must endeavour to attain for ourselves the true meaning of the language employed'—in the Articles and Liturgy—'assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject matter to which the instruments relate, and the meaning of the words employed.' " In this House, where the judgment of the Court of Appeal was reversed (*Attorney-General v. West Riding of Yorkshire County Council* (3)) no reference was made to this point. It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted. Mr. Latter relied on certain observations of Lord Halsbury L.C. in *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade-Marks*. (4) The Lord Chancellor was there referring to the Report of a Commission that had sat to enquire into the working of the earlier Act, which had been superseded by the Act actually being construed by the House: but Lord Halsbury refers to the Report not directly to ascertain the intention of the words used in the

(1) [1906] 2 K. B. 676, 717.

(2) (1852) The Case of the Rev. G. C. Gorham against the Bishop of Exeter as heard and determined by the Judicial Committee of the

Privy Council on appeal from the Arches Court of Canterbury, by Edmund F. Moore.

(3) [1907] A. C. 29.

(4) [1898] A. C. 571, 575.

Act, but because, as he says, "no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission." Lord Halsbury, it is clear, was treating the Report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used so that the case came within the principle stated by Lord Langdale. The rule is in principle analogous to the rules laid down in the four resolutions of the Barons of the Exchequer recorded in *Heydon's Case*. (1)

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On the facts of the present case, I am of opinion that the appellants fail in their contention. The section requires that the taxpayer should prove (1.) that he has paid tax in the United Kingdom for any year on a certain sum which is part of his income; in this connection I do not think that the word "part" is used to exclude the whole but merely to point to an ascertainable sum of income which is brought into question; (2.) that he has paid tax in the Dominion "in respect of" the same part of his income for that year: here the words "in respect of" as contrasted with "on" do not, I think, involve any latent distinction, since the word "on" would be inapplicable to the "same part of his income" which becomes a separate taxable subject in the Dominion. The taxpayer then becomes entitled to relief. It seems clear that there must be a definite part of income brought into question, and that can only be expressed in a sum of money. As income *ex vi termini* must be expressed in a sum of money, the words "the same part of his income" must involve a comparison between two sums of money, which prove to be the same.

The contention of the appellants is to the contrary: it is said on their behalf that the words "the same part of his income" refer solely to what is called the source, and that identity of amount is immaterial and does not come into question except for the purpose of ascertaining the rate of tax to be allowed for.

I cannot agree with this argument. No doubt, questions of

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source, as it has been called, that is, such questions as where the income comes from, are essential to identify, so far as that aspect goes, what is taxed in the United Kingdom with what is taxed in the Dominion; but in addition the income itself, that is, the amount of money, must also be identified. I think the words "the same part of his income" are apt to include both elements of comparison and identification.

The facts here may be peculiar in that they present none of the complications which will often prevent a clear identification and comparison of the income on which United Kingdom tax is paid with that on which the Dominion tax has been paid. There may, for instance, be differences in regard to the year of charge, or in the method of computing the income for tax purposes: thus, in *Rolls Royce, Ltd. v. Short* (1), the part of the company's income there in question paid no tax in the United Kingdom because that part was not taxable as the law then stood, no profits having been made by the company on their Indian business on the average of the three preceding years, whereas in India, as now both in India and the United Kingdom, tax was payable on the basis of the preceding year's income which by itself showed a profit: hence, though tax had been paid on the profit in question in India, the foundation of a claim under s. 27 failed because the company had not paid or become liable to pay tax on those profits in the United Kingdom. Certain observations in that case are to be read in reference to its special facts. But there is no such discrepancy in the present case: the appellants having paid tax in the United Kingdom on 186,750*l.* have not paid tax at all in India on two definite and separable amounts, parts of that sum of 186,750*l.*—namely, 42,500*l.*, the debenture interest, and the sum representing the profits of the tea garden. On the words of the section it seems that appellants can only show double taxation in regard to 129,365*l.*, which is a part of the 186,750*l.* In other words, I think that in such a case as this where definite amounts are in question, "paid" means paid in fact and cannot be applied in truth to these definite amounts, which are simply in India deducted from the profits assessable, as not

being liable to tax at all. Accordingly, in the facts of this case, I do not think it is correct to say that the appellants have paid in India tax on the whole sum of 186,750*l.* so as to be able to claim relief on the whole. I reject the contention made on behalf of the appellants and based by them on the ground that the whole sum has been taxed to its full taxable capacity according to Indian law ; the admissible deductions, it is said, amount simply to a method of assessment or computation of the entire profits, and not a mere immunity of certain items. No doubt there may be cases in which a reduction in the amount of the assessment in the Dominion may be consistent merely with a difference in computation, so that it may be said that the larger sum taxed in the United Kingdom ought to be regarded as taxed in toto in the Dominion by the smaller assessment, and that the taxpayer in that event has paid tax on the same part of his income taken at the larger figure both in the United Kingdom and in the Dominion. But I think that on the true view of the facts of the present case certain definite parts of income which are taxed in the United Kingdom are excluded from taxation altogether in India, so that the element of double taxation does not exist at all in regard to those parts of the appellants' income.

In other words, in my judgment the same part of their income on or in respect of which the appellants have paid double tax, is not 186,750*l.* but 129,365*l.*, and it is on that part alone of their income that they are entitled to relief.

In the result, I think the appeal should be dismissed.

*Order appealed from affirmed, and appeal dismissed
with costs.*

Lords' Journals, July 24, 1934.

Solicitors for appellants : *Taylor & Humbert.*

Solicitor for respondents : *The Solicitor of Inland Revenue.*

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Next door to Mrs. Smith lived a Mrs. Brine, a sister of Mrs. Smith and aunt of the deceased woman. On the morning of December 10, 1934, Mrs. Brine, who was in the back yard of No. 25, heard the appellant's voice saying: "Are you coming back or not?" and "Where's your mother?" Then she heard the back door of No. 24 slam, and then the report of a gun. She looked out of her front window, and saw the appellant. She called to him; he made no reply, but mounted his bicycle and rode away. She went into No. 24, and found her niece lying on the mat. She had been shot through the heart.

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The appellant gave evidence to the following effect: After a sleepless night on December 9-10 he thought he might frighten his wife into obedience by threatening to shoot himself. On December 10 he went to the farm till 8.20 A.M.; came home to have his breakfast; then went back to the farm, and took a gun belonging to Mr. Cheeseman, which lay on a shelf in a barn. Near the gun was a box containing two cartridges. With a fret-saw belonging to his father he sawed off part of the barrels and threw that part and the saw into a brook, and loaded the gun with the two cartridges. Then he put the gun under his overcoat in a pocket used for carrying rabbits, and returned home. There he attached to the gun some flex for carrying electric current, and with this he suspended the gun from his right shoulder and under his overcoat; and so equipped he rode on his bicycle to Mrs. ^{Smith} Brine's house. There he tapped at the front door; his wife opened it; she was washing clothes in the kitchen. They went into the back room. He said: "Are you coming back or not, Vi?" but got no answer. His wife shut the back door, and they went into the front room. His wife said she would not go back, but had decided to go into service. Then he said, if she would not come back to him he would shoot himself; and, to explain how he meant to do this, and to show her the gun with which he meant to do it, he unbuttoned his overcoat, and brought the gun across his waist. The gun went off; he did not know it was pointing at his wife. She fell to the ground. He did not know what to do. He went out of the house and to his

H. L. (E.) own home. There he saw his mother and told her that he
 1935 had been up and shot his wife. He threw the gun on a bench
 WOOLMING- in the outhouse and rode to Mr. Cheeseman and said to him :
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" I shall not be coming to work any more, as I have shot my wife."

A note was found in the pocket of the appellant's coat. It was in these terms :—

" Good bye all.

" It is agonies to carry on any longer. I have kept true hoping she would return this is the only way out. They ruined me and I'll have my revenge. May God forgive me for doing this but it is the Best thing. Ask Jess to call for the money paid on motor bike (Wed.). Her mother is no good on this earth but have no more cartridges only 2 one for her and one for me. I am of a sound mind now. Forgive me for all trouble caused

" Good bye

" ALL

" I love Violet with all my heart

XX Reg."

The appellant was cross-examined about the date when this note was written, whether it was before or after the death of his wife. He persisted in his statement that it was written after the death, and gave his explanation of its contents.

He said that after having written it he went downstairs and waited for the police ; he intended to shoot himself ; he went outside and met his father in the lane. He told his father he was going to shoot himself, but his father persuaded him not to. Then the policeman arrived and took him to the police station. When he was charged, he said : " I want to say nothing, except I done it, and they can do what they like. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back, that's all."

The appellant was first tried at Taunton on January 23, 1935, before Finlay J. and a jury. After considering their verdict for an hour and twenty-five minutes that jury disagreed.

At the trial out of which the present appeal arises Swift J. in his summing-up gave the following direction to the

jury: "A charge is made against Reginald Woolmington, the prisoner at the bar, of wilful murder. It is said that on the morning of December 10, about half-past nine, he murdered his wife. That she died whilst he was in that house you will, I should think, have little doubt. It is a matter entirely for you. If you accept his evidence, you will have little doubt that she died in consequence of a gun-shot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, unless the contrary appeareth.' (1) That has been the law of this country for all time since we had law. Once it is shown to a jury that somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

Then, after reviewing and commenting upon the evidence, the learned judge added these words: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this

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(1) Foster's Crown Law (1762), p. 255.

H. L. (E.) case, which alleviate the crime so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident."

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The jury, after considering their verdict for an hour and nine minutes, found the appellant guilty of wilful murder.

The appellant applied to the Court of Criminal Appeal for leave to appeal against his conviction, but that Court, as stated above, refused the application.

The Attorney-General having certified that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that, in his opinion, it was desirable in the public interest that a further appeal should be brought, the present appeal was brought before this House.

April 4. *T. J. O'Connor K.C.* and *J. D. Casswell* for the appellant. In delivering the judgment of the Court of Criminal Appeal, Avory J. said : " The point, and really the only point, of complaint as regards this summing-up is that the learned judge did not anywhere use the expression that the jury should acquit the accused altogether, or convict him only of manslaughter, if they entertained any reasonable doubt about the truth of his explanation of how his wife came by her death. It may be that it would have been better if the learned judge had in those few words said to the jury that if they entertained reasonable doubt whether they could accept his explanation, they should either acquit him altogether or convict him of manslaughter only."

This is precisely the exception which the appellant takes to the summing-up of Swift J. ; and the complaint which he makes against the order of the Court of Criminal Appeal is that the learned judges did not take a more serious view of the omission of the trial judge to make it quite clear that the onus still lay upon the prosecution. If at the end of a trial for murder a reasonable doubt remains in the minds of the jury whether the crime has been committed, it is their duty to acquit. However the matter may have been regarded in former years, at the present time the Criminal Law rests on the foundation that, apart from statutory

enactment to the contrary, the prosecution must prove the guilt of the prisoner; otherwise he must be acquitted. Earlier authorities, such as Sir Michael Foster in the Introduction to the Discourse of Homicide in that learned judge's work on Crown Law (1); *Mackalley's* case (2); *Rex v. Legg* (3); *Rex v. Oneby* (4); East, Pleas of the Crown (5); *Rex v. Greenacre* (6); and Blackstone, Commentaries (7), are concerned primarily with the definition of homicide and malice. Sir Michael Foster's description of murder is repeated in Archbold's Criminal Pleading and Evidence (8) and Russell on Crimes. (9) The proper direction to the jury is that which was given by Finlay J. at the former trial. That learned judge said: "The case for the prosecution is deliberate shooting. The defence is, Not Guilty of murder. They" (the prosecution) "prove the killing, and in the absence of explanation that is murder. The defence say 'Excusable, because accidental.' Consider whether you entertain the slightest doubt that this was a deliberate killing. If you have no doubt, it is your duty to convict. . . . If the result of a dispassionate survey is to leave a reasonable doubt in your minds, then your duty as well as your pleasure is to acquit." It is for the prosecution to satisfy the jury on all the evidence that the prisoner is not an innocent man, but a guilty man. They must take the whole of the evidence into consideration and then it is not for the prisoner to say: "My explanation is such that it must satisfy you." It is enough for him if he says: "This is my explanation," and if the jury on considering it are left in a reasonable doubt. Then it is their duty to acquit the prisoner. "Where, a prima facie case having been made against him, the defendant offers an explanation, the jury must be directed that the onus of proof of guilt is still on the prosecution, and that, if on the whole evidence they are in doubt, they should acquit": Roscoe, Criminal Evidence. (10) This is the result

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(1) (1762) Clarendon Press, p. 255. (5) (1803), p. 224.

(2) (1611) 9 Co. Rep. 65 b.

(6) 8 C. & P. 35, 42.

(3) (1674) Kelyng, 27.

(7) Book IV., c. 14.

(4) (1727) 2 Ld. Raym. 1484,

(8) 29th Ed. (1934), p. 873.

1493.

(9) 8th Ed. (1923), Vol. I, p. 615.

(10) 15th Ed. (1928), p. 300.

H. L. (E.) of numerous decisions: *Rex v. Stoddart* (1); *Rex v. Davies* (2);
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 [The following cases were also referred to: *Rex v. Sturges* (8);
Rex v. Davies (9); *Rex v. Hopper* (10); *Rex v. Brain*. (11)]

April 5. *J. G. Trapnell K.C.* and *Reginald Knight* for the respondent. The killing of any human creature is homicide: Blackstone, Commentaries. (12) Felonious homicide is the killing of a human creature without justification or excuse. (13) Manslaughter is the unlawful killing of another without malice either express or implied. (14) "When a man of sound memory, and of the age of discretion, unlawfully killeth . . . any reasonable creature in *rerum natura* under the king's peace, with malice forethought, either expressed by the party, or implied by law" (15) this is murder. Then comes the question of proving the commission of the crime. The Crown must prove that the prisoner killed the man. The prisoner knows how he did it; formerly he could not give evidence, but he still knew. The dead man knew, but cannot say. In the absence of evidence of others, the Court must needs resort to inference. It considers how the death wound was inflicted; by a gun, or a knife, or a hammer or other lethal weapon. Such facts supply evidence of malice prepense. When all the knowledge is in the mind of the accused, it is most reasonable that he should state, or his advocate should suggest, how the death occurred. It is not necessary to press the point that, in the absence of other available evidence, killing is *per se prima facie* evidence of malice, because in the present case death was inflicted by a lethal weapon; but even so, one cannot with a light heart dismiss the

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| (1) (1909) 2 Cr. App. R. 217, 244. | (8) (1913) 9 Cr. App. R. 120. |
| (2) (1913) 29 Times L. R. 350; | (9) (1913) 29 Times L. R. 350; |
| 8 Cr. App. R. 211. | 8 Cr. App. R. 211. |
| (3) (1914) 31 Times L. R. 88. | (10) (1915) 11 Cr. App. R. 136. |
| (4) (1915) 11 Cr. App. R. 182. | (11) (1918) 13 Cr. App. R. 197. |
| (5) (1917) 33 Times L. R. 428. | (12) Book IV., Ch. 14, <i>passim</i> . |
| (6) (1919) 14 Cr. App. R. 11. | (13) <i>Ibid</i> ; p. 188. |
| (7) [1933] A. C. 699, 706. | (14) <i>Ibid</i> ; p. 191. |

(15) Coke, 3 Inst. 47.

statement of so high an authority as Sir Michael Foster (1), H. L. (E.) followed in East (2); Blackstone, Commentaries (3); and repeated in Archbold, Criminal Pleading and Evidence (4), 1935 WOOLMING-
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and Halsbury, Laws of England. (5) Moreover, the appellant's own explanation, that he intended to frighten his wife into obedience by threatening to shoot himself, and showing her the gun which he meant to use, discloses an unlawful intention and is sufficient evidence of malice aforethought.

The additional facts of the note found in the pocket of his coat, and the words: "May God forgive me for doing this but it is the best thing. . . . Her mother is no good . . . but I have no more cartridges only 2 one for her and one for me," show first, that the note was written before the deed, and secondly that he intended to shoot his wife and himself and that, if he had had a third cartridge, he would have used it also. Those facts together show that he went to the house with a malicious intention. If in pursuing a malicious intention a man, even by accident, kills another person, that is murder.

In that view the case is a proper one for the application of s. 4 of the Criminal Appeal Act, 1907.

Counsel was not called on in reply.

At the end of the argument for the respondent VISCOUNT SANKEY L.C. announced that the order of the Court of Criminal Appeal would be reversed and that the conviction would be quashed; and that their Lordships would give their reasons at a later date.

May 23. VISCOUNT SANKEY L.C. My Lords, the appellant, Reginald Woolmington, after a trial at the Somerset Assizes at Taunton on January 23, at which, after an absence of one hour and twenty-five minutes, the jury disagreed, was convicted at the Bristol Assizes on February 14 of the wilful murder of his wife on December 10, 1934, and was sentenced

(1) Crown Law (1762), p. 255.

(3) Book IV., c. 14, pp. 200, 201.

(2) Pleas of the Crown (1803),

(4) 29th Ed. (1934), p. 873.

p. 224.

(5) 2nd Ed. (1933), Vol. 9, p. 426.

H. L. (E.) to death. He appealed to the Court of Criminal Appeal, substantially upon the ground that the learned judge had misdirected the jury by telling them that in the circumstances of the case he was presumed in law to be guilty of the murder unless he could satisfy the jury that his wife's death was due to an accident.

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The appeal came before the Court of Criminal Appeal upon March 18 and was dismissed. The Court said "it may be that it might have been better" had the learned judge who tried the case said to the jury that if they entertained reasonable doubt whether they could accept his explanation they should either acquit him altogether or convict him of manslaughter only; but, relying upon s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which provides "that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred," they dismissed the appeal.

Thereupon the Attorney-General gave his fiat certifying that the appeal of Reginald Woolmington involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. The matter now comes before your Lordships' House.

The facts are as follows. Reginald Woolmington is 21½ years old. His wife, who was killed, was 17½ years old last December. They had known each other for some time and upon August 25 they were married. Upon October 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them and she left him upon November 22 and went to live with her mother. Woolmington apparently was anxious to get her to come back, but she did not come. The prosecution proved that at about 9.15 in the morning of the 10th Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard

and could recognize the voice of Reginald Woolmington saying something to the effect "are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and she saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle, which had been left or was standing against the wall of her house, No. 25. She called out to him but he gave no reply. He looked at her hard and then he rode away.

According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of December 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm, and while milking conceived this idea that he would take the old gun which was in the barn and he would take it up that morning to his wife's mother's house where she was living, and that he would show her that gun and tell her that he was going to commit suicide if she did not come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast and then left, taking with him a hack saw. He returned to the farm, went into the barn, got the gun, which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack saw, crossed a field about 60 yards wide and dropped them into the brook. Having done that, he returned on his bicycle, with the gun in his overcoat pocket, to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder underneath his coat, and so went off to the house where his wife was living. He knocked at the door, went into the kitchen and asked her: "Are you coming back?" She made no answer. She came into the

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parlour, and on his asking her whether she would come back she replied she was going into service. He then, so he says, threatened he would shoot himself, and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house. He told the jury that it was an accident, that it was a pure accident; that whilst he was getting the gun from under his shoulder and was drawing it across his breast it accidentally went off and he was doing nothing unlawful, nothing wrong, and this was a pure accident. There was considerable controversy as to whether a letter in which he set out his grievances was written before or after the above events. But when he was arrested at 7.30 on the evening of the 10th and charged with having committed murder he said: "I want to say nothing, except I done it, and they can do what they like with me. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back. That's all."

The learned judge in summing-up the case to the jury said:—

"If you accept his evidence, you will have little doubt that she died in consequence of a gunshot wound which was inflicted by a gun which he had taken to this house, and which was in his hands, or in his possession, at the time that it exploded. If you come to the conclusion that she died in consequence of injuries from the gun which he was carrying, you are put by the law of this country into this position: The killing of a human being is homicide, however he may be killed, and all homicide is presumed to be malicious and murder, unless the contrary appears from circumstances of alleviation, excuse, or justification. 'In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been founded in malice until the contrary appeareth.' That has been the law of this country for all time since we had law. Once it is shown to a jury that

somebody has died through the act of another, that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less, something which might be alleviated, something which might be reduced to a charge of manslaughter, or was something which was accidental, or was something which could be justified."

At the end of his summing-up he added: "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. They must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident."

In the argument before the Court of Criminal Appeal cases were cited by the learned counsel on either side and text-books of authority were referred to, but the learned judges contented themselves with saying "there can be no question to start with that the learned judge laid down the law applicable to a case of murder in the way in which it is to be found in the old authorities." They repeated the learned judge's words and said: "No doubt there is ample authority for that statement of the law." They then relied, as I have already mentioned, upon the proviso to s. 4 of the Criminal Appeal Act, 1907, and dismissed the appeal.

It is true as stated by the Court of Appeal that there is apparent authority for the law as laid down by the learned judge. But your Lordships' House has had the advantage of a prolonged and exhaustive inquiry dealing with the matter in debate from the earliest times, an advantage which was not shared by either of the Courts below. Indeed your Lordships were referred to legal propositions dating as far back as the reign of King Canute (994-1035). But I do not think it is necessary for the purpose of this opinion to go as far back as that. Rather would I invite your Lordships to begin by considering the proposition of law

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H. L. (E.) which is contained in Foster's Crown Law, written in 1762, and which appears to be the foundation for the law as laid down by the learned judge in this case. It must be remembered that Sir Michael Foster, although a distinguished judge, is for this purpose to be regarded as a text-book writer, for he did not lay down the doctrine in any case before him, but in an article which is described as the "Introduction to the Discourse of Homicide." In the folio edition, published at Oxford at the Clarendon Press in 1762, at p. 255, he states: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate, must appear in evidence before he can avail himself of them."

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Now the first part of this passage appears in nearly every text-book or abridgment which has been since written. To come down to modern times, the passage appears in Stephen's Digest of the Criminal Law (1); also in the well known treatise of Archbold, Criminal Pleading, Evidence and Practice (2), which is the companion of lawyers who practise in the criminal courts. It also appears almost textually in Russell on Crimes (3) and in the second edition of Halsbury's Laws of England (4), which purports to state the law as on May 1, 1933, where it is said: "When it has been proved that one person's death has been caused by another, there is a prima facie presumption of law that the act of the person causing the death is murder, unless the contrary appears from the evidence either for the prosecution or for the defence. The onus is upon such person when accused to show that his act did not amount to murder." The

(1) 7th Ed. (1926), p. 235.

(3) 8th Ed. (1923), Vol. 1, p. 615.

(2) 29th Ed. (1934), p. 873.

(4) (1933), Vol. 9, p. 426.

authority for that proposition is given as Foster, pp. 255, 290, and also the case of *Rex v. Greenacre*. (1) H. L. (E.)

The question arises, Is that statement correct law? Is it correct to say, and does Sir Michael Foster mean to lay down, that there may arise in the course of a criminal trial a situation at which it is incumbent upon the accused to prove his innocence? To begin with, if that is what Sir Michael Foster meant, there is no previous authority for his proposition, and I am confirmed in this opinion by the fact that in all the text-books no earlier authority is cited for it. Before, however, one considers the earlier criminal law several facts have to be remembered.

First, it was not till 1907 that the Court of Criminal Appeal was set up. It is perfectly true that from time to time there have been famous occasions on which the Judges and Barons were called together to give their opinion upon the law bearing on murder. Examples of this will be found; in the year 1611, in the case of *Mackalley* (2), all the Judges and Barons were moved to give their opinion; in 1706, in the case of *Reg. v. Mawgridge* (3), which case was argued before all the Judges and all of them except Lord Chief Justice Trevor were of opinion that Mawgridge was guilty of murder; and in 1843 in the case of *Reg. v. M'Naughton* (4), where all the Judges gave answers to your Lordships' House upon the test of insanity.

M'Naughton's case (4) stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naughton's* case (4) the onus is definitely and exceptionally placed upon the accused to establish such a defence. See *Rex v. Oliver Smith* (5), where it is stated that the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, must be established by the defendant. But it was added that all the judges had

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(1) 8 C. & P. 35.

(3) (1706) Kelyng, 119; 17 St. Tr. 57.

(2) 9 Co. Rep. 65b.

(4) (1843) 4 St. Tr. (N. S.) 847.

(5) (1910) 6 Cr. App. R. 19.

H. L. (E.) met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. See also Archbold, 29th Edition. (1), It is not necessary to refer to *M'Naughton's* case (2) again in this judgment, for it has nothing to do with it.

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It is true that at a later period certain cases were reserved by the judges for the consideration of the Court of Crown Cases Reserved, but many of the propositions with regard to criminal law are contained either in the summing-up of the judges or in text-books of authority as distinguished from a Court sitting in banc.

The learned author of Stephen's Digest of the Criminal Law (3) has an interesting note on the definition of murder and manslaughter. But his remarks are rather directed to the ingredients of the crime than to the proof of it. None the less, the author does not hesitate to tread a path of very robust criticism of the previous authorities. He speaks of the "intricacy, confusion and uncertainty of this branch of the law." He refers to the definition of Coke (1552-1623) and says "these passages, overloaded as Coke's manner is, with a quantity of loose, rambling gossip, form the essence of his account of murder." He describes Coke's chapter on manslaughter as "bewildering" and adds that Hale (1609-1676) treats manslaughter in a manner so meagre and yet so confused that no opinion of it can be obtained except by reading through chapters 38 to 40 and trying to make sense of them, and concludes by saying (p. 466) that Sir Michael Foster "to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence."

Next it must be remembered that prisoners were not entitled to be represented by counsel, except in cases of felony, where counsel might argue the law on their behalf.

Thirdly, it must not be forgotten that the prisoner himself

(1) (1934) 18, 874.

(2) 4 St. Tr. (N. S.) 847.

(3) 7th Ed. (1926), pp. 461, 462.

was not allowed to give evidence before the Act passed in 1898. (1) H. L. (E.)

Bearing these considerations in mind, I now turn to some of the cases cited to us. I doubt whether in any of the early ones the question of the burden of proof was considered. Rather they were concerned with the ingredients of the crime of murder. One of the first difficulties was to settle the meaning of express and implied malice. It was not till 1825 that Bayley J, in *Bromage v. Prosser* (2), gave his famous definition of malice as meaning a wrongful act, done intentionally without just cause or excuse. The older cases were rather concerned to give examples of what might be malice. This was so in *Mackalley's* case. (3) The prisoner was there accused of murdering a serjeant of London. The Courts were already considering cases of express or implied malice, and the passage in Coke appears simply to mean that if a man does acts calculated to kill, and actually does kill, that is evidence of malice or intent ; in other words, evidence of one of the ingredients of murder, but it does not seem to be at all concerned with onus of proof or to support the statement of Sir Michael Foster on that point.

One of the most famous of the earlier treatises on criminal law was the History of the Pleas of the Crown by Sir Matthew Hale. That celebrated judge died on Christmas Day, 1675. It was known that he had left a treatise on the subject, and upon November 29, 1680, it was ordered by the House of Commons that the executors of Sir Matthew Hale be desired to print the manuscript relating to Crown Law and a Committee be appointed to take care of the printing thereof. It is not said that anything appears in Hale suggesting that the burden of proving his innocence lay on the prisoner. Looking at the edition of 1800 (4) we find him again concerned with what malice is. It is headed "Concerning murder by malice implied presumptive, or malice in law," and *Mackalley's* case (3) is duly cited.

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(1) The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36). (2) (1825) 4 B. & C. 247. (3) 9 Co. Rep. 65 b.

(4) Chapter 37, Vol. 1, p. 454.

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As appears from Foster's Pleas of the Crown, Sir Michael Foster was familiar with Hale's treatise (see his preface), and although in the course of his book he makes reference to Hale, he gives no authority for the proposition which is under discussion. It cannot be doubted that at that time in English Courts of justice the law of evidence was in a very fluid condition. Indeed in some civil cases it differed on different circuits. See *Weeks v. Sparke* (1) and also the note xx. in Stephen's Digest of the Law of Evidence. (2) It was only later that the Courts began to discuss such things as presumption and onus. In Wigmore on Evidence (3), a reference is made to the judgment of Weaver J. in the case of *The State v. Brady*. (4) This was cited in the case of *Rex v. Stoddart* (5) :—

“The use of the terms ‘presumption of guilt’ and ‘prima facie evidence of guilt’ with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. . . . ‘Presumptions’ of guilt and ‘prima facie’ cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offence with which he is charged.”

We were referred to the case of *Rex v. Legg* (6), where it is said that at the Newgate Session in 1674 “one John Legg, being indicted for the murder of Mr. Robert Wise, it was upon the evidence agreed that if one man kill another, and no sudden quarrel appeareth, this is murder.” *Mackalley's* case (7) is quoted as an authority and the report goes on: “and it lieth upon the party indicted to prove the sudden quarrel.” With regard to Kelyng's Reports, the critics have greatly differed. Sir John Kelyng was Chief Justice of the King's Bench. He died in 1671 and whatever opinion may be held about him as a judge, upon which see Foss's Biographical

(1) (1813) 1 M. & S. 679, 687, 688.

(2) 11th Ed. (1930), p. 182.

(3) Vol. 4, section 2513, note on page 3562.

(4) (1902) 1a. 91 N. W. 801.

(5) 2 Cr. App. R. 217, 233.

(6) Kelyng, 27.

(7) 9 Co. Rep. 65 b.

Dictionary of The Judges of England (1), the critics have differed greatly upon the value of his Reports. Lord Campbell in his Life of Kelynge, Lives of the Chief Justices (2), says "He compiled a folio volume of decisions in criminal cases, which are of no value whatever." But, on the other hand, there are others who regard the book as of high authority: see Wallace on The Reporters (3).

The report of *Legg's* case (4) is meagre and unsatisfactory and cannot, I think, be held to mean that unless the prisoner prove the sudden quarrel, he must be convicted of murder. The word "onus" is used indifferently throughout the books, sometimes meaning the next move or next step in the process of proving or sometimes the conclusion of the whole matter.

Mawgridge's case (5), already referred to, was cited to us from Kelyng's Reports, but it was not reported by Kelyng for the simple reason that it was not tried till 1706. Campbell, in the Lives of the Chief Justices (6), says it was reported by Holt and makes caustic comments on Holt's English composition. It was added by Holt to his Edition of Kelyng's Reports and is described as a case of "great expectation" and gives the history of murder trials in English Courts from the earliest times. The case, however, is no authority for saying that the prisoner at any time is called upon to prove his innocence; quite the contrary. It is another of those cases which deal with malice and with what is such provocation as will make the act of killing to be manslaughter only.

In Hawkins' Pleas of the Crown (7): "It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or se defendendo, but that he must plead 'not guilty,' and give the special matter in evidence." This points to the fact that the verdict must be given not on any special pleading given by the prisoner but

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- (1) (1870), p. 381. p. 209) dismissed Kelyng with a
(2) (1849) Vol. 1, p. 511. very short paragraph. . . . F.P.]
(3) London (1882), p. 327. (4) Kelyng, 27.
[F. F. Heard, the editor of this (5) Kelyng, 119; 17 St. Tr. 57.
reprint, made additions and alter- (6) Vol. 2, p. 176.
ations in Wallace's text without (7) 8th Ed. (Curwood), 1824,
notice to the reader. Wallace Vol. 1, p. 88, s. 25.
himself (3rd ed. Philadelphia 1855,

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upon and as the result of the whole of the case, and it nowhere suggests that the burden of proof either at the beginning or at the end of a case is not on the prosecution.

The case of *Rex v. Greenacre* (1) was certainly heard by a very distinguished judge, Tindal, C.J. But it is to be observed that the dictum relied upon by the prosecution in this case—namely: “that where it appears that one person’s death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder,” was contained in the summing-up of the learned judge to the jury. It is the passage in Sir Michael Foster and this summing-up which are usually relied on as the authority for the proposition that at some particular time of a criminal case the burden of proof lies on the prisoner to prove his innocence. The presumption of innocence in a criminal case is strong: see Taylor On Evidence (2), and it is doubtful whether either of these passages means any such thing. Rather do I think they simply refer to stages in the trial of a case. All that is meant is that if it is proved that the conscious act of the prisoner killed a man and nothing else appears in the case, there is evidence upon which the jury may, not must, find him guilty of murder. It is difficult to conceive so bare and meagre a case, but that does not mean that the onus is not still on the prosecution.

If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such

(1) 8 C. & P. 35, 42.

114, Vol. 1, pp. 107, 108; 12th

(2) 11th Ed. (1920), ss. 113,

Ed. (1931), Vol. 1, pp. 107, 108.

facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt ; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of *Rex v. Abramovitch* (1), which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in *Rex v. Davies* (2), the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. [Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be

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(1) (1914) 11 Cr. App. R. 45.

(2) 29 Times L. R. 350; 8 Cr. App. R. 211.

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entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i.) intentional and (ii.) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.) It is not the law of England to say, as was said in the summing-up in the present case: "if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident." If the proposition laid down by Sir Michael Foster (1) or in the summing-up in *Rex v. Greenacre* (2) means this, those authorities are wrong.

We were then asked to follow the Court of Criminal Appeal and to apply the proviso of s. 4 of the Criminal Appeal Act, 1907, which says: "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." There is no doubt that there is ample jurisdiction to apply that proviso in a case of murder. The Act makes no distinction between a capital case and any other case, but we think it impossible to apply it in the present case. We cannot say that if the jury had been

(1) Ante, p. 474.

(2) 8 C. & P. 35, 42.

properly directed they would have inevitably come to the same conclusion. H. L. (E.)

In the result we decline to apply the proviso and, as already stated, we order that the appeal should be allowed and the conviction quashed.

My noble and learned friend Lord Atkin, who has to preside at the Privy Council to-day, asks me to say that he concurs in the opinion which I have delivered.

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LORD HEWART C.J. My Lords, I concur.

LORD TOMLIN. My Lords, I also concur.

LORD WRIGHT. My Lords, I also concur.

*Order of the Court of Criminal Appeal reversed,
and conviction quashed : Further ordered that
the cause be remitted back to the Court of
Criminal Appeal to do therein as shall be just
and consistent with this judgment.*

Lords' Journals, April 5, 1935.

Solicitors for appellant: *C. Butcher & Simon Burns, for
Clarke, Willmott & Clarke, Taunton.*

For the respondent: *The Director of Public Prosecutions.*

trial Court. The decision of the trial Court was reversed by the Supreme Court of the Irish Free State on July 31, 1933. In the same year, on August 9, a Bill was introduced in the Dail Eireann having for its object the termination of the right of appeal to His Majesty in Council from the Irish Free State Courts. On September 29 the appellants presented a petition to His Majesty in Council for special leave to appeal from the judgment of the Supreme Court. On October 9 their Lordships of the Judicial Committee decided to humbly advise His Majesty to grant special leave. On October 31 an amendment to the Bill was moved in the Irish Senate to extend the Bill to pending proceedings. On November 10 an order was made by His Majesty in Council granting the appellants special leave to appeal. On November 15 the Bill, including the amendment extending it to pending proceedings, was passed by the Irish Free State Parliament as The Constitution (Amendment No. 22) Act, 1933. The appellants thereupon presented this petition praying to have it declared that Amendment No. 22 was void and did not bar their appeal.

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1934. Dec. 3, 4. 1935. Jan. 9, 10, 11. *Wilfrid Greene K.C.* and *Blanco White* for the petitioners. In considering constitutional powers, it is material to ascertain the origin and development of the Constitution. The facts may be conveniently taken from Mansergh: "The Irish Free State, Its Government and Politics." Reference was made to the Treaty, the Government of Ireland Act, 1920 (10 Geo. 5, c. 67), the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), the Constituent Act passed by the third Dail, October 25, 1922, and the Irish Free State Constitution Act, 1922 (13 Geo. 5, Sess. 2, c. 1).

Legal effect was given to the Treaty and the Constituent Act by the Irish Free State Constitution Act, 1922, and the Constitution derives its validity and legal force from this Act. The two questions which arise are: (1.) Whether it is competent to the Irish Legislature to pass legislation inconsistent with the Treaty; and (2.) Whether it is competent to diminish the Royal prerogative. Article 1 of the Treaty provided that

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the Irish Free State should have the same constitutional status in the British Empire as Canada, and article 2 that its relations with the Imperial Parliament should be the same as the Canadian. The oath, which is significant of the Imperial aspect of the Constitution, was provided for in article 4 of the Treaty and incorporated in article 17 of the Constitution Act. Article 50 of the Constitution Act provided for amendment of the Constitution within the terms of the Treaty. The Constitution (Amendment No. 6) Act of 1933, which purported to abolish the oath and to delete the words "within the terms of the Treaty" from article 50, was incompetent, because the Irish Legislature could not pass an Act repugnant to the Treaty: *The State (Ryan and Others) v. Lennon and Others* (Supreme Court, December 19, 1934, unreported). There was no express provision in the Treaty regarding the right of appeal to His Majesty in Council, but this right is preserved by the proviso to article 66 of the Constitution Act. The Irish Legislature was incompetent to abolish this right not only because, as part of the Canadian Constitution, it was impliedly incorporated in the Treaty and its abolition would be repugnant to the Treaty, but also because it would be an interference with the Royal prerogative, which cannot be affected except by an Imperial statute and by express words or necessary implication. The power to legislate for the peace, order and good government of the Free State must be construed as power to legislate consistently with the Treaty and would not include the power to affect the prerogative. The Statute of Westminster does not make it competent to a Dominion to legislate on classes of subjects which before the Statute were outside its competence. The power to repeal or amend Imperial Acts is not extended by s. 2 to repeals or amendments which would have effect outside the Dominion. The Statute does not expressly or by necessary implication confer the power to affect the Royal prerogative. The Constitution (Amendment No. 22) Act which is now in question purports to amend the Constitution in so far as that preserves the right of appeal, but it does not repeal the Judicial Committee Acts, which, in creating a statutory body to advise the King, recognize the prerogative.

[*Webb v. Outtrim* (1); *Macleod v. Attorney-General for New South Wales* (2) were referred to.] The present case is *suu generis* because of the Treaty, which not only conferred rights, but imposed obligations. If Amendment No. 22 is competent, it would follow that the Irish Free State could repeal the whole of the Constitution Act. The Statute of Westminster does not enable the abrogation of the Treaty as merely a part of the law of the Irish Free State.

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Sect. 6 deals with only one aspect of the prerogative. The British North America Act gave power to set up a Supreme Court, but no power to take away the prerogative: *Nadan v. The King*. (3) That the Canadian Legislature can deprive Canadian Courts of the power to grant leave to appeal to His Majesty in Council may be conceded. It cannot take away the prerogative right to grant special leave. The power to affect the prerogative depends on the Constitution, not the Statute of Westminster. Sect. 2 of the Statute does not extend the powers of the Dominions so far as to enable them to interfere with the prerogative. It merely removes certain restrictions. In the case of Australia and South Africa express power is given to diminish the right of appeal. In New Zealand power is given to legislate for peace, order and good government. The prerogative does not fall within that: e.g., the prerogative of mercy. In some instances the prerogative has been decentralized and the power to grant leave to appeal has been abridged: *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*. (4) A local Legislature can deprive itself of the power to grant leave to appeal but cannot affect the Royal prerogative to grant special leave. It is the privilege of the subject to petition the King and the prerogative of the King to entertain the appeal: Bentwich, 2nd ed., p. 56, and *Nadan v. The King*. (3) Power to legislate for peace, order and good government does not include the power to prevent the subject from applying for special leave to appeal, because that would be an indirect interference with the prerogative and

(1) [1907] A. C. 81.

(2) [1891] A. C. 455.

(3) [1926] A. C. 482, 491.

(4) [1892] A. C. 437.

J. C. the subject cannot be deprived of the right of appeal by
 1935 indirect methods. It would require strong and clear words
 MOORE to take away the prerogative: *Théberge v. Laudry* (1),
 v. followed in *Strickland v. Grima* (2); *Cushing v. Dupuy* (3);
 THE *Attorney-General v. Constable* (4); *Ex parte Postmaster General*
 ATTORNEY- *In re Bonham* (5); *In re Wi Matua's Will* (6); *Viscountess*
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The Free State Legislature cannot take away the prerogative because that is outside its Constitution: *Nadan v. The King* (9) and *Performing Right Society Ltd. v. Bray Urban District Council*. (10)

The declarations in the Reports of the Imperial Conferences 1926, 1929 and 1930 show that the prerogative right of appeal was not dealt with. Article 2 of the Treaty does not handcuff the Irish Free State to Canada, but it is the starting-point of the Free State Constitution. The Free State cannot extend its legislative competence and, unless it can get rid of an Imperial overriding limitation, it cannot abolish the right of appeal to His Majesty in Council by special leave. The prerogative follows where colonies are formed. The Free State Constitution differs from that of Canada in that it is more rigid. The effect of articles 1 and 2 of the Treaty is to create a right of appeal to His Majesty in Council which cannot be interfered with by the Free State Legislature.

The respondents were not represented.

Sir Thomas Inskip A.-G. and *Wilfrid Lewis*, by invitation to assist the Board. Confining the argument to the effect of the Treaty, the Treaty was made law both in England and the Irish Free State by statute. Article 2 of the Treaty contains implicitly a right of appeal to the King in Council: *Performing Right Society Ltd. v. Bray Urban District Council* (11) is conclusive as to that. If implicit in article 2 it is law, because the Treaty was given the form of law and is not

(1) (1876) 2 App. Cas. 102.

(2) [1930] A. C. 285.

(3) (1880) 5 App. Cas. 409.

(4) (1879) 4 Ex. D. 172.

(5) (1879) 10 Ch. D. 595, 600.

(6) [1908] A. C. 448.

(7) [1922] 2 A. C. 339, 365.

(8) [1907] A. C. 81, 91.

(9) [1926] A. C. 482.

(10) [1930] A. C. 377, 395, 396.

(11) [1930] A. C. 377.

merely a treaty subject to renunciation. The Constitution and the Treaty are interlocked. Article 50 of the Constitution Act does not permit any amendment which is contrary to the scheduled Treaty. Under the Statute of Westminster, however, it is within the power of the Irish Free State Legislature to pass laws contrary to the Treaty, and it has done so, though it has not chosen to invoke the authority of that Statute. But, having regard to the contractual obligations under the Treaty, the Irish Free State Legislature is not free to abolish the right of appeal to His Majesty in Council. It would be a breach of treaty obligations if the Irish Free State Legislature were to do away with the Treaty.

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June 6. The judgment of their Lordships was delivered by

VISCOUNT SANKEY L.C. This is a petition to have it declared that an amendment to the Constitution of the Irish Free State, namely, Constitution (Amendment No. 22) Act, 1933, is no bar to the maintenance by the petitioners, who are the appellants, of their appeal before this Board. The petitioners claim to be owners of a fishery in the tidal waters of the River Erne in Ireland. They had brought an action in the Irish Courts to enforce their claim and had succeeded before the trial judge. On appeal to the Supreme Court that judgment was reversed on July 31, 1933, by a majority. The petitioners then presented to the Privy Council their petition for special leave to appeal, the grant of which leave was, on October 9, 1933, advised by this Board, and on November 10, 1933, an order granting such leave was made by the King in Council. But on November 15, 1933, an Act was passed by the Oireachtas of Saorstát Éireann, the Parliament of the Irish Free State, "hereinafter called the Oireachtas," providing that no appeal should lie to His Majesty in Council from any Court in the Irish Free State: this enactment was also expressed to apply to appeals then pending. The petitioners thereupon brought this petition praying to have it declared that the enactment was void and did not bar their appeal.

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The Attorney-General of the Irish Free State and the other respondents did not appear before this Board; the Attorney-General of Great Britain did, however, appear and gave the Board his assistance on the law relevant to the questions at issue.

For the decision of these questions it is necessary to consider the mode in which the Constitution of the Irish Free State was established.

On December 6, 1921, there were signed in London "Articles of an Agreement for a Treaty between Great Britain and Ireland": this instrument will hereinafter be referred to as "the Treaty": it was signed by representatives of Great Britain on the one hand and of the Irish Free State (or what became the Irish Free State) on the other. On March 31, 1922, an Act of the Imperial Parliament was passed. It was entitled the Irish Free State (Agreement) Act, 1922, and by s. 1, sub-s. 1, it provided that as from the date of that Act the Treaty, which was scheduled to it, should have the force of law. It also provided by s. 1, sub-s. 2, that there should be elected certain members of a body to be called the House of the Parliament to which the Provisional Government should be responsible and which should have power, as respects matters within the jurisdiction of that Government, to make laws in like manner as the Parliament of the Irish Free State when constituted. The latter provision was expressed to be in order to give effect to article 17 of the Treaty, which was in the following terms:—

"By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its

duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof."

This Act gave no power to "the House of the Parliament" to enact a Constitution for the Irish Free State.

In due course "the House of the Parliament," which was a single chamber body, was elected and met on September 9, 1922; it proceeded to sit as a constituent assembly for the settlement of the Constitution of the Irish Free State. The measure which it so passed was scheduled to an Act of the Imperial Parliament entitled the Irish Free State Constitution Act, 1922, which received the Royal Assent on December 5, 1922, and which described the measure as the Constituent Act and by s. 1 provided as follows:—

"The Constitution set forth in the First Schedule to the Constituent Act shall, subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, be the Constitution of the Irish Free State, and shall come into operation on the same being proclaimed by His Majesty in accordance with Article eighty-three of the said Constitution, but His Majesty may at any time after the proclamation appoint a Governor-General for the Irish Free State."

The provisions to which the Constitution was made subject by the Constituent Act were recited in the Act and were as follows:—

"The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further

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legislation and do all such other things as may be necessary to implement the Scheduled Treaty."

Sects. 4 and 5 of the Act were in the following terms :—

"4. Nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions.

"5. This Act may be cited as the Irish Free State Constitution Act, 1922 (Session 2), and shall be deemed to be the Act of Parliament for the ratification of the said Articles of Agreement as from the passing whereof the month mentioned in Article eleven of the said Articles is to run."

Thus the Treaty received the force of law, both in the United Kingdom and in Ireland, by reason of the passing of an Act of the Imperial Parliament ; and the Constituent Act owed its validity to the same authority.

Before referring to the material clauses of the Constitution, it will be convenient to quote clauses 1 and 2 of the Treaty, which were as follows :—

"1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

"2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."

The construction and effect of clause 2 were considered by the Judicial Committee in *Performing Right Society Ltd. v.*

Bray Urban District Council (1): it was there held that the words of that clause specially ensured the right to petition His Majesty in Council, because that right was part of the law, practice and constitutional usage then governing the relationship of the Crown or representative of the Crown and of the Imperial Parliament to the Dominion of Canada. Their Lordships in the present case follow that decision.

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Of the Articles of the Constitution the following are so material in this matter that they should be set out here in full:—

“ Article 12.—A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as ‘ Dáil Eireann ’) and the Senate (otherwise called and herein generally referred to as ‘ Seanad Eireann ’). The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Eireann) is vested in the Oireachtas.

“ Article 50.—Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.

“ Article 66.—The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law)

(1) [1930] A. C. 377, 395, 396.

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and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever :

“ Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.”

It seems that the proviso to article 66 of the Constitution was inserted to give effect in that particular regard to article 2 of the Treaty, and hence under article 50 of the Constitution that proviso could not be amended in the way in which it is sought to amend it by abolishing the right of appeal, because such an amendment would not be within the terms of the Scheduled Treaty.

On December 6, 1922, there was issued a Proclamation of His Majesty announcing the passing and adoption of the Constitution, and thereafter the House of Parliament or Constituent Assembly or Provisional Parliament was in due course dissolved and a Parliament called the Oireachtas for the Irish Free State was elected in due course.

On May 14, 1929, the Oireachtas passed an Act (the Constitution Amendment No. 16 Act, 1929) which substituted for the eight years specified in article 50 as being the period during which amendment might be made without a referendum, a period of sixteen years. All the subsequent amendments which are referred to in this judgment were made without a referendum, in accordance with this amendment. Mr. Wilfrid Greene for the petitioners rightly conceded that Amendment No. 16 was regular and that the validity of these subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum.

On December 11, 1931, the Statute of Westminster, hereinafter called “the Statute,” was enacted. It was the result of the proceedings at the Imperial Conference, 1930, in which representatives of the Irish Free State took part

together with the delegates of the other Dominions ; that fact is recorded in the first recital, and in the last recital it is recorded that the Irish Free State, with the other Dominions, had requested and consented to the submission of the measure to the Parliament of the United Kingdom. Sect. 1 includes in the expression Dominion (with the other Dominions) the Irish Free State. Of the other sections that which is most relevant in these proceedings is s. 2, which is in the following terms :—

“ 2.—(1.) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

“(2.) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.”

Sects. 3 and 4 also refer to the Irish Free State as being a Dominion within the meaning of the Statute.

On May 3, 1933, the Oireachtas passed an Act, No. 6 of 1933, entitled the Constitution (Removal of Oath) Act, 1933 ; that Act by s. 2 provided that s. 2 of the Constitution of the Irish Free State (Saorstat) Act, 1922, should be repealed and by s. 3 that article 50 of the Constitution should be amended by deleting the words “ within the terms of the Scheduled Treaty.”

Finally, on November 15, 1933, the Oireachtas, as already stated, enacted the Constitution (Amendment No. 22) Act, 1933, amending article 66 of the Constitution so as to terminate the right of appeal to His Majesty in Council.

It is clear that, if this last mentioned amending Act is valid, the petition must fail, because the amendment of the Constitution embodied in that Act must bar the right of

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appeal to the King in Council, if it is effective. But it cannot be effective unless the earlier Act (No. 6 of 1933) is also valid—namely, that which is directed to removing from article 50 the condition that there can be no amendment of the Constitution unless it is within the terms of the Scheduled Treaty. On the construction of article 2 of the Treaty, which has been adopted above, article 50, while it stands unamended, must prevent any amendment of the Constitution which would impair that right of appeal, that is, any amendment whereby the right of appeal to the King in Council is to be impaired. Hence it must be determined whether that Act of the Oireachtas, No. 6 of 1933, was validly enacted.

Mr. Greene for the petitioners has contended that this last mentioned Act was not valid. His argument was that the Constitution derived its existence not from any legislation of the Imperial Parliament but solely from the operations of an Irish body, the Constituent Assembly, which is called in Ireland the Third Dail Eireann: this body, it is said, though mentioned in the Irish Free State (Agreement) Act, 1922, was in fact elected pursuant to a resolution passed on May 20, 1922, by the Second Dail Eireann, an Irish legislative assembly. The Third Dail Eireann was thus, it was alleged, set up in Ireland by election of the people of Ireland of their own authority as a Constituent Assembly to create a Constitution, and having accomplished its work went out of existence, leaving no successor and no body in authority capable of amending the Constituent Act. The result of that argument is that a Constitution was established which Mr. Greene has described as a semi-rigid Constitution, that is one capable of being amended in detail in the different articles according to their terms, but not susceptible of any alteration so far as concerns the Constituent Act, unless perhaps by the calling together of a new constituent assembly by the people of Ireland. Thus the articles of the Constitution may only be amended in accordance with article 50, which limits amendments to such as are within the terms of the Scheduled Treaty. On that view Mr. Greene argues that

the law No. 6 of 1933 is ultra vires and hence that the amendment No. 22 of 1933 falls with it. It follows from that argument, if accepted, that the right of appeal to the King in Council is preserved unimpaired. In support of his argument that the Constituent Act and the Constitution are subject only to what is called Irish law and outside the authority of the Imperial Parliament, either in inception or in possibility of alteration save as provided therein, Mr. Greene referred their Lordships to an unreported case in the Supreme Court of Ireland, *The State (Ryan and Others) v. Lennon and Others*, the judgment in which was delivered on December 19, 1934. In that case Kennedy C.J. is reported to have expressed a view which corresponds in substance to that contended for by Mr. Greene. But their Lordships cannot accept these contentions. In their opinion the Constituent Act and the Constitution of the Irish Free State derived their validity from the Act of the Imperial Parliament, the Irish Free State Constitution Act, 1922. This Act established that the Constitution, subject to the provisions of the Constituent Act, should be the Constitution of the Irish Free State and should come into operation upon being proclaimed by His Majesty, as was done on December 6, 1922. The action of the House of Parliament was thereby ratified; apart from such ratification that body had no authority to make a Constitution; all the authority it originally possessed was derived from the Irish Free State (Agreement) Act, 1922, s. 1, sub-ss. 1 and 2, of which have been referred to above; those sub-sections only gave the House of Parliament jurisdiction to make laws in respect of matters within the jurisdiction of the Provisional Government. It has been pointed out in the foregoing statement that in the Statute the Irish Free State was treated as one of the Dominions, the delegates of which took part in the Imperial Conference of 1930. The Irish Free State is in their Lordships' judgment bound by the Acts of the Imperial Parliament in the same way as any other of the Dominions; if it were not for s. 2 of the Statute the Oireachtas would have had no power to amend or repeal an Act of the Imperial Parliament and has now

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such power only so far as any such Act is part of the law of the Dominion in virtue of s. 2 of the Statute. Hence the Act No. 6 of 1933 and the Amendment No. 22 of 1933, and certain other Acts of the Oireachtas not here material which contain amendments of the articles which are not within the terms of the Treaty, are valid Acts of the Oireachtas only in virtue of the Statute. For the Statute alone gives to the Oireachtas power to repeal or amend the Constituent Act, which has the force of an Imperial enactment by reason that it is embodied in the Irish Free State Constitution Act, 1922. Mr. Greene has contended that these amendments cannot be deemed to be valid under the Statute because the Oireachtas in enacting these Acts was not purporting to proceed under the Statute, but was assuming to proceed solely under Irish law. But as what the Oireachtas was doing was in truth, as already stated, the repealing or amending of parts of an Imperial Statute, namely, the Irish Free State Constitution Act, 1922, what the Oireachtas did must, in their Lordships' judgment, be deemed to have been done in the way in which alone it could legally be done, that is by virtue of the powers given by the Statute. It follows that by virtue of the Statute, article 66 of the Constitution has been validly amended, with the result that the proviso to that article is removed and appeals to the King in Council are now prohibited.

The position may be summed up as follows :—

(1.) The Treaty and the Constituent Act respectively form parts of the statute law of the United Kingdom, each of them being parts of an Imperial Act.

(2.) Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act.

(3.) The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That Legislature can now pass Acts repugnant to an Imperial Act. In this case they have done so.

It would be out of place to criticize the legislation enacted by the Irish Free State Legislature. But the Board desire to add that they are expressing no opinion upon any contractual obligation under which, regard being had to the terms of the Treaty, the Irish Free State lay. The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power.

Mr. Greene has finally contended that the amendment is invalid because it affects the prerogative of the King in a matter outside the Dominion and outside the competence of the Oireachtas. It might be possible to state many objections to this contention, but it is enough here to say that whatever might be the position of the King's prerogative if it were left as matter of the common law, it is here in this particular respect and in this particular enactment made matter of Parliamentary legislation, so that the prerogative is pro tanto merged in the Statute, and the Statute gives powers of amending and altering the statutory prerogative. This objection also fails.

In the result their Lordships are of opinion that the petition should fail and be dismissed.

They will humbly so advise His Majesty.

Solicitors for petitioners: *Mackrell, Maton, Godlee & Quincey.*

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FROM THE COURT OF KING'S BENCH, QUEBEC.

Canadian Statute 23 & 24 Geo. 5, c. 53, s. 17—Right of Appeal to the King in Council—Competency of Dominion Legislature to abrogate the right—Nature of right—Judicial Committee Acts, 1833 and 1844 (3 & 4 Will. 4, c. 41, and 7 & 8 Vict. c. 69)—Powers of Canadian Legislature under British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63)—Effect of Statute of Westminster, 1931 (22 Geo. 5, c. 4).

On a preliminary objection to the competency of a petition for special leave to appeal to the King in Council from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec in a criminal matter on the ground that the petition was incompetent by reason of the prohibition of appeals to His Majesty in criminal matters by the Canadian Statute 23 and 24 Geo. 5, c. 53, s. 17:—

Held, that the petition was incompetent. Before the Statute of Westminster, 1931 (22 Geo. 5, c. 4), the Canadian Legislature was subject to the limitations imposed by the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), by which legislation repugnant to an Act of the Imperial Parliament was declared void, by s. 129 of the British North America Act, 1867 (30 & 31 Vict. c. 3), and also by the doctrine forbidding extra-territorial legislation. These limitations were abrogated by the Statute of Westminster. The extent of the legislative competence conferred on the Canadian Legislature in regard to appeals to the King in Council in criminal matters must now be ascertained from its constituent Act, the British North America Act, 1867. The right of appeal to the King in Council is a prerogative right, and the prerogative cannot be restricted, or qualified save by express words or necessary intendment, Sect. 91 of the Act read with the rest of the Act, not by express words, but by necessary intendment, does invest the Canadian Legislature with power to regulate or prohibit appeals to the King in Council in criminal matters. Appeal to the King in Council is prohibited in precise words by s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53.

Nadan v. The King [1926] A. C. 482 explained.

* *Present*: VISCOUNT SANKEY L.C., LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, and LORD WRIGHT.

Nature of the prerogative appeal and functions of the Judicial Committee under the Judicial Committee Acts, 1833 and 1844 (3 & 4 Will. 4, c. 41, and 7 & 8 Vict. c. 69), explained.

Cushing v. Dupuy (1880) 5 App. Cas. 409; *Attorney-General for Ontario v. Reciprocal Insurers* [1924] A. C. 328, 348; *Hodge v. The Queen* (1883) 9 App. Cas. 117; *Attorney-General for Canada v. Cain* [1906] A. C. 542; and *In re Louis Marois* (1862) 15 Moo. P. C. 189 referred to.

Petition for special leave to appeal dismissed.

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PETITION for special leave to appeal.

The British Coal Corporation and four other coal importing companies were convicted on a charge of combining together with a view to unduly restraining the coal industry by the King's Bench (Crown Side) on December 12, 1933. An appeal from the conviction was dismissed by the King's Bench (Appeal Side) of the Province of Quebec on October 5, 1934.

On a petition for special leave to appeal from this judgment to His Majesty in Council, objection was taken to the competency of the petition on the ground that appeals to His Majesty in Council in criminal cases from any judgment or order of any Court in Canada were effectively prohibited by 23 & 24 Geo. 5, c. 53, s. 17 (Canada).

On this preliminary objection :

1935. March 18, 19, 21, 28, 29; April 1, 2, 8, 9. *Wilfrid Greene K.C.*, *Burchell K.C.* (Nova Scotia), *J. H. Stamp*, and *Oyler* (Nova Scotia) for the petitioners. Before the Statute of Westminster, 1931, was passed there was in the Criminal Code of Canada a section which purported to take away in criminal matters the right of appeal to His Majesty in Council. In *Nadan v. The King* (1) it was held that that section was beyond the competence of the Dominion Legislature and was inoperative. After the Statute of Westminster the section was repealed and re-enacted by s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53. In so far as this Statute purports to prohibit appeals to the King in Council in criminal matters it is incompetent. The right to entertain appeals from Courts in the King's Dominions and Colonies is a prerogative right,

(1) [1926] A. C. 482.

J. C. of the King as the fountain of justice inherent in the Crown
 1935 and inseparable from it : *Christian v. Corren.* (1) It is vested
 BRITISH in the King as sovereign of the Empire and not in the King
 COAL in right of the particular Dominion or Colony concerned.
 CORPORA- It is exercised by the King in his Privy Council on the advice
 TION v. of the Judicial Committee and not by the King in the Privy
 THE KING. Council or other Council of a Dominion or Colony : *Performing
 Right Society Ltd. v. Bray U. D. C.* (2) This prerogative remains
 vested in the King save in so far as it has been taken away
 or diminished by or under the authority of an Act of the
 Imperial Legislature. In order to take away or diminish
 this prerogative or to empower a Dominion or Colonial Legis-
 lature to take it away or diminish it there must be express
 words or necessary implication : *Cuvillier v. Aylwin* (3) ;
Théberge v. Laudry (4) ; *Cushing v. Dupuy* (5) ; *Moses v.
 Parker* (6) ; *Attorney-General v. Constable* (7) ; *Ex parte
 Postmaster-General In re Bonham* (8) ; *Webb v. Outtrim* (9) ;
 Maxwell on Interpretation of Statutes, 2nd ed., 117-132. The
 only instances in which this prerogative has been taken away
 or diminished, or power has been given so to do, are the
 Commonwealth of Australia Act, 1908, and the Union of
 South Africa Act, 1909, where express words are used.

Under the British North America Act, 1867, it was never
 within the competence either of the Dominion or of the
 Provincial Legislatures to take away or diminish this pre-
 rogative. Express words and necessary implication are both
 lacking. The words " peace, order and good government of
 Canada " are insufficient for the purpose, the King's pre-
 rogative right to hear appeals being a right vested in the
 sovereign outside and paramount to the Dominion. The
 words " procedure in criminal matters " in s. 91, sub-s. 27,
 are confined to procedure in the Courts of Canada and are
 not apt to describe appeals to the King in Council : *Nadan
 v. The King.* (10)

(1) (1716) 1 P. Wms. 329, 330.

(2) [1930] A. C. 377, 396.

(3) (1832) 2 Knapp, 72.

(4) (1876) 2 App. Cas. 102.

(5) 5 App. Cas. 409.

(6) [1896] A. C. 245.

(7) (1879) 4 Ex. D. 172.

(8) (1879) 10 Ch. D. 595.

(9) [1907] A. C. 81.

(10) [1926] A. C. 482, 492.

The Statute of Westminster contains no words which expressly or by necessary implication confer power to take away or diminish this prerogative. The preamble embodying the Resolutions and Declarations of the Imperial Conferences of 1926 and 1930 contains no suggestion that it was one of the objects of the Act to confer such a power ; on the contrary it shows plainly that it was not one of the objects. In a matter of such far-reaching constitutional importance direct authority would be given or none at all : *Webb v. Outtrim* (1) ; *Viscountess Rhondda's Claim*. (2) The first part of s. 2, sub-s. 2, is merely a reversal of s. 2 of the Colonial Laws Validity Act, 1865, and is not sufficiently precise to cover this prerogative. The latter part does not apply to this prerogative, because it does not arise under any Act of Parliament of the United Kingdom or any order, rule or regulation made under any such Act, but exists by virtue of the common law, although it is regulated by the Judicial Committee Acts so far as they extend and so long as they are in force. Sect. 3 merely declares to be non-existent or removes a fetter on its legislative power in respect of matters within its competence (1929, Conference Report, p. 16, para. 38 ; *Macleod v. Attorney-General for New South Wales* (3) ; *Croft v. Dunphy* (4), which suggests that the section is really declaratory). Both on general principles and by reason of s. 7, sub-s. 3, the Statute does not empower either the Dominion or the Provinces to legislate in respect of matters previously outside their competence.

¶ The Statute of Westminster does not affect the construction of the British North America Act, 1867. To construe the Statute as giving to the Dominion power to take away the right of appeal from a Provincial Court in a criminal matter is in effect to alter the British North America Act and depart from the federal bargain by giving to the Dominion a new power to deprive the inhabitants of the Provinces of a right which they enjoyed under the British North America Act and as subjects of the King.¶ If the Dominion has by virtue

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(1) [1907] A. C. 81, 91.

(2) [1922] 2 A. C. 339, 365, 375.

(3) [1891] A. C. 455.

(4) [1933] A. C. 156.

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of the Statute power to take away the right of appeal in criminal matters, it also has power to take away the right of appeal from the Supreme Court. Under s. 101 of the British North America Act this right of appeal to the King in Council necessarily came into existence upon the creation of the Supreme Court, and its destruction would involve an alteration of the British North America Act and a departure from the federal bargain to the prejudice of the Provinces. ✓

Sect. 129 prohibits the repeal of pre-confederation Imperial Statutes extending to Canada. Among these statutes were the 'Judicial Committee Acts' and accordingly it was never within the competence either of the Dominion or any Provincial Legislature to repeal those Acts. The repeal of those Acts would be a violation of sub-ss. 1 and 3 of s. 7 of the Statute of Westminster.

✓ The Judicial Committee Acts do not destroy the prerogative nor do they embody it in statutory form—they recognize its existence but provide a new statutory body to hear appeals and advise the King. ✓ The order allowing the appeal is still made by the King in Council by virtue of the prerogative and not by virtue of any statutory power under the Acts. ✓ Neither s. 2 nor s. 3 of the Statute of Westminster empowers a Dominion Legislature to repeal or affect the Judicial Committee Acts in so far as they relate to the hearing of appeals by the Judicial Committee or the making of orders by the King in his Privy Council. ✓ Even if this be not so, the effect of repealing the Judicial Committee Acts in so far as they are part of the law of the Dominion leaves unimpaired the prerogative right of the King which existed before the passing of those Acts to direct his Courts of justice and his Governors in his Dominions to give effect to his orders as provided in the common form of Order in Council: *Attorney-General v. De Keyser's Royal Hotel, Ltd.* (1); *In re Barnett* (2); *Mayor of New Windsor v. Taylor*. (3)

The Canadian Statute now in question does not purport to repeal the Judicial Committee Acts in so far as they

(1) [1920] A. C. 508, 539.

(2) (1844) 4 Moo. P. C. 453, 458.

(3) [1899] A. C. 41.

are part of the law of Canada, i.e., it does not attack the prerogative through its local machinery but attacks the prerogative itself. It cannot be assumed that it would attack the local machinery if satisfied that the prerogative was outside its powers.

Hon. Sir Stafford Cripps K.C. and Radcliffe K.C. for the Attorney-General for Quebec ; Tilley K.C. and Read K.C. (Nova Scotia) for the Attorney-General for Canada.

The right to entertain appeals from Courts in the King's Dominions and Colonies was originally a prerogative right of the King. ¹This right, in common with all other forms of prerogative right, is subject to the power of any Legislature that has for the time being the constitutional power to control it. ^vBy the Judicial Committee Acts, 1833 and 1844, this part of the prerogative was put into statutory form. ¹These Acts made it impossible for the King to rely on his prerogative in place of his statutory right. ⁴*Attorney-General v. De Keyser's Royal Hotel, Ltd.* (1) ; and the jurisdiction of the Judicial Committee to hear appeals from any Dominion depends upon the continued operation in that Dominion of these Acts. The true question is, therefore, whether the Canadian Legislature has power to repeal or amend the Judicial Committee Acts in relation to criminal appeals from Canada. ⁴Express words or necessary implication is required to affect the prerogative in a municipal statute, but there is no authority for saying that this is required in a statute conferring constitutional powers. ⁴In the latter prerogative rights are necessarily affected by implication in conferring legislative and executive powers. Plenary powers are implied in the words "peace, order, and good government." The control of the prerogative right to hear appeals in s. 74 of the Commonwealth of Australia Act, and s. 106 of the Union of South Africa Act, is treated as within the legislative powers given in ss. 51 and 59 respectively to legislate for "peace, order and good government." If, however, ss. 74 and 106 respectively are regarded as positive enabling provisions, they were necessary to override the Judicial Committee Acts and not to overcome

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any supposed lack of authority to deal with the prerogative. In the British North America Act competence to deal with the prerogative is conferred by s. 91. It is implied in the power to legislate for "the peace, order, and good government of Canada," in relation to all matters . . . coming within the classes of subjects" . . . , which includes (27) The criminal law and procedure in criminal matters. The words "peace, order and good government" authorized the widest discretion of enactment: *Riel v. The Queen*. (1)

In the Instructions to Governors and the Acts before 1867 the power of the Canadian Legislature to affect the prerogative by virtue of its general powers was assumed, the prerogative being safeguarded either by the device of reservation or express exception. The plenitude of the sovereignty of the Dominion and Provincial Legislatures in their respective spheres and their power to affect the prerogative has been recognized: *Hodge v. The Queen* (2); *Attorney-General for Ontario v. Attorney-General for Canada* (3); *Maritime Bank of Canada v. Receiver-General of New Brunswick* (4); *Attorney-General for Canada v. Attorney-General for Ontario* (5); *Attorney-General for Canada v. Cain* (6); *Bonanza Creek Gold Mining Co., Ltd. v. The King* (7); *Attorney-General for Nova Scotia v. Legislative Council of Nova Scotia* (8); *Croft v. Dunphy*. (9)

Before the Statute of Westminster the power of the Dominion Parliament to legislate with regard to criminal appeals to His Majesty in Council was fettered by (1.) the Colonial Laws Validity Act, 1865; (2.) possibly, though this is not conceded, by s. 129 of the British North America Act, 1867; and (3.) the doctrine of extra-territorial limitation. *Nadan v. The King* (10) was decided on two grounds: (a) the Dominion Parliament could legislate only for "action to be taken in the Dominion," and (b) the Colonial Laws Validity Act avoided any legislation inconsistent with the Judicial Committee Acts. The proposition that if the prerogative is to be excluded that must

(1) 10 App. Cas. 675, 678.

(2) 9 App. Cas. 117.

(3) [1912] A. C. 571.

(4) [1892] A. C. 437.

(5) [1898] A. C. 247.

(6) [1906] A. C. 542.

(7) [1916] 1 A. C. 566.

(8) [1928] A. C. 107.

(9) [1933] A. C. 156.

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be accomplished by an Imperial Statute (1) is only deduced from the previous proposition that the Act of 1867, having regard to the first ground, had not given the necessary power.

The Resolutions and Declarations of the Imperial Conferences of 1926 to 1930 (to which reference was made) are sources of the highest importance from which to ascertain the law of the Constitution. Constitutional usage which a court of law would recognize as binding is Constitutional Law. By this law Great Britain and the Dominions are autonomous communities equal in status. The Statute of Westminster must be construed with regard to this position. 'The object of the Statute was to give or extend legislative powers in the Dominions irrespective of the consequences.' The combined effect of s. 2, sub-s. 2, and s. 3 is to remove all existing fetters on the legislative competence of the Dominion Parliament to deal with appeals to His Majesty in Council in criminal matters.

The Statute alters the British North America Act, 1867, in that it releases the appropriate Legislatures from disability, if any, under s. 129 to make laws repugnant to Imperial Acts. Sect. 7, sub-s. 1, of the Statute does not say that the Statute itself does not affect the British North America Act. What it says is that a repeal, alteration or amendment of the British North America Acts, 1867 to 1930, by any subsequent Act of the Dominion Parliament is not to derive validity from the Statute. Sect. 7, sub-s. 3, merely preserves the balance of powers between the Dominion and Provincial Legislatures which is established by the British North America Act.

The prerogative as to hearing of appeals was embodied in and superseded by the Judicial Committee Acts, and under the Statute of Westminster, s. 2, sub-s. 2, the Canadian Parliament is empowered to deal with the situation as it pleases. If the matter is still one of prerogative right the Canadian Parliament under the British North America Act, 1867 (30 & 31 Vict. c. 3), had power to deal with it so long as any alteration made was not repugnant to an Imperial Statute, and that restriction has now been removed.

Sir Thomas Inskip A.-G. (with him Wilfrid Lewis), on

(1) [1926] A. C. 493.

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invitation, to assist the Board. *Nadan v. The King* (1) was decided on two grounds: (1.) repugnancy of the Canadian Act to Imperial Acts, and (2.) its incompetence by reason of its extra-territorial effect. On the second ground the wrong view was taken in treating special leave to appeal as not being an action in the Dominion. Only geographically is the Privy Council a Court of Great Britain: observations of Lord Haldane in *Hull v. McKenna*. (2) The development of the constitution in relation to the Dominions is illustrated by *In re Regulation and Control of Radio Communication in Canada*. (3) As soon as the Parliament of a Dominion has power to deal with a subject as a sovereign power, its Acts are as effective as those of the Parliament of Great Britain: *Webb v. Outtrim*. (4) The question in *Cushing v. Dupuy* (5) was whether the prerogative was dealt with, not what powers were conferred by the Imperial Legislature. Until *Nadan's* case (1) there was no authority that express words in an Imperial Act are necessary to affect the Royal prerogative. In *Nadan's* case (1) it was the language of the colonial Act that was examined. 'If "peace, order and good government" under the British North America Act includes the power to deal with the legal rights of citizens, no express words or necessary intendment in the Statute of Westminster, 1931 (22 Geo. 5, c. 4), dealing with the prerogative are required.'

Wilfrid Greene K.C. in reply. If the respondent's contention is right, the right of appeal in civil cases from the Provinces can be taken away by the Dominion Legislature, and it is impossible to read the Statute of Westminster as having this result, particularly in view of the proceedings of the Imperial Conferences recited in the preamble.

[Reference was made to Dicey's Law of Constitution, 8th ed., pp. 39, 62, 66, and to the difference between conventions and law, *Ibid.* p. 413.] The Judicial Committee Acts were not substituted for the Royal prerogative. They left it untouched, merely prescribing the manner in which it was to be exercised.

(1) [1926] A. C. 482.

(2) [1926] I. R. 402.

(3) [1932] A. C. 304.

(4) [1907] A. C. 81, 88.

(5) 5 App. Cas. 409.

The general power to legislate for "peace, order, and good government" does not include the power to deal with the prerogative.

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June 6. The judgment of their Lordships was delivered by VISCOUNT SANKEY L.C. This is a petition for special leave to appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, delivered on October 5, 1934. The petitioners had been convicted on December 12, 1933, under s. 498 of the Canadian Criminal Code and under ss. 2 and 32 of the Combines Investigation Act, 1923, before the Court of King's Bench (Crown Side) and had been subjected to fines totalling \$30,000, but the more serious effect to the petitioners of the conviction was that their business operations in the import of British anthracite coal were held to be illegal. The conviction was upheld by the judgment of the Appeal Court.

Before their Lordships proceeded to consider questions appertaining to the merits of the petition, they decided in the first instance to determine a preliminary objection, which was that the petition was incompetent by reason of the provisions of s. 17 of the Canadian Statute 23 & 24 Geo. 5, c. 53 (an Act to amend the Criminal Code), which was in the following terms: "sub-s. 4 of s. 10 of the said Act (the Criminal Code) is repealed and is hereby re-enacted as follows:—

"(4.) Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard."

It is clear that if this enactment is valid, the petition is barred. It is, however, contended on behalf of the petitioners that the section is invalid. A section in identical terms had been held invalid by the Judicial Committee in *Nadan v. The King* (1), and that decision was founded upon in these proceedings by the petitioners, who contended on various grounds

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that the enactment of the Statute of Westminster, 1931, had not affected the position which the decision just cited had established. On behalf of the respondent it was argued that the Statute of Westminster, 1931 (which will be referred to here as "the Statute"), had removed certain fetters which according to that decision had till then affected the legislative competence of Canada in the relevant respects, and that, these fetters being removed, the provisions of the British North America Act of 1867 had full effect to invest the Parliament of Canada with power to enact the section in question.

It will be convenient to summarize in the briefest terms the nature of the appeal from Dominion or Colonial Courts to His Majesty in Council. The position of this Board, the Judicial Committee of the Privy Council, in relation to such appeals may first be indicated. The Judicial Committee is a statutory body established in 1833 by an Act of 3 & 4 Will. 4, c. 41, entitled an Act for the better Administration of Justice in His Majesty's Privy Council. It contains (*inter alia*) the following recital: "And whereas, from the decisions of various courts of judicature in the East Indies, and in the plantations, and colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council." The Act then provides for the formation of a Committee of His Majesty's Privy Council, to be styled the Judicial Committee of the Privy Council, and enacts that "all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act or of any law, statute or custom may be brought before His Majesty in Council" from the order of any Court or judge should thereafter be referred by His Majesty to, and heard by, the Judicial Committee, as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open Court. The Act contained a great number of provisions for the conduct of appeals. It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to

His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the statute of 1833 all appeals within their purview are referred.

A later Act, the Judicial Committee Act, 1844, must next be mentioned. Apart from certain changes in procedure, the main effect of that Act was to authorize Her Majesty to provide, by Order or Orders in Council made for that purpose, for the admission of any appeals to Her Majesty in Council from judgments or orders of any Court of justice within any British Colony or possession abroad even though such Court might not be a Court of Error: this followed a recital that by the laws in force in certain of Her Majesty's Colonies no appeal could be brought save only from Courts of Error or of Appeal and that it was expedient to provide that Her Majesty in Council should be authorized to admit such appeals. In effect therefore Her Majesty in Council was thus empowered to override a Colonial law limiting or excluding appeals to Her Majesty in Council from any colonial Court.

In this way the functions of the Judicial Committee as a Court of law were established. The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions on which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was indeed a residuum of the Royal prerogative of the sovereign as the fountain of justice. In early days it was to the King that any subject who had

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failed to get justice in the King's Court brought his petition for redress. As time went on, such petitions were brought to the King in Parliament (which was the origin of the modern judicial functions of the House of Lords) or to the King in his Chancery (from which flowed the jurisdiction of the Court of Chancery). But this was so only in causes which had been dealt with in English Courts: from the Courts of the Channel Islands and later from the Courts of the Plantations or Colonies the petition went to the King in Council, and this continued to be the practice after the jurisdiction of the Privy Council in English common law cases had been abolished. It was this appellate jurisdiction (along with other jurisdictions such as in Admiralty or Ecclesiastical Causes) which was affirmed and regulated by Parliament in the Privy Council Acts of 1833 and 1844. Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as a Court of law in reality, though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports, but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council.

In 1865 the Colonial Laws Validity Act was passed. It was described as an Act to remove doubts as to the validity of Colonial Laws: for this context it is enough to say that it was an Act which declared that a colonial law should be deemed to be and to have been void to the extent that it was repugnant to any Act of the Imperial Parliament extending to the colony or any order or regulation made under such Act.

In 1867 the British North America Act (hereinafter called "the Act") was passed. It was an Act to provide for the establishment in Canada of one Dominion and for the Legislative Authority in the Dominion and to declare the nature of the executive government therein. It was declared that the executive government of and over Canada should

be vested in the Queen, and that there should be a Council (the Queen's Privy Council in Canada) to aid and advise in the government of Canada. The legislative power was vested in the Parliament for Canada, which by s. 91 was to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by s. 92 exclusively to the Legislatures of the Provinces: without restricting the generality of that provision, certain matters were specifically enumerated as falling within the exclusive legislative authority of the Parliament of Canada: of these it is sufficient here to mention No. 27, which was "the criminal law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters." On the other hand, among the matters assigned by s. 92 exclusively to the Provincial authority there fell No. 14: "The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." By s. 101 of the Act it was provided: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada." Under the last mentioned section the Parliament of Canada by an Act of 1875 established (along with the Exchequer Court) "The Supreme Court of Canada" which was to exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada: it was provided by s. 47 that "the judgment of the Supreme Court should be in all cases final and conclusive Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative."

In 1880 in the case of *Cushing v. Dupuy* (1), which was an appeal from the Court of Queen's Bench for Quebec, the Judicial Committee had to consider the effect of a Dominion

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Act dealing with insolvency, which contained a clause providing that "the judgment of the Court to which under this section the appeal can be made shall be final." That Court in the case in question was the Court of Queen's Bench for Quebec. The Judicial Committee decided that as the Act in question "contains no words which purport to derogate from the prerogative of the Queen to allow as an act of grace appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it." But they added that they did not consider it necessary "to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative."

In 1888 a section identical in terms with the section now in question was enacted as s. 1025 of the Criminal Code of Canada. Between that year and 1926 appeals came before the Board in which the question of the validity of that section might have been raised but was not or, if it was raised, was not the subject of decision. To take one instance, in *Attorney-General for Ontario v. Reciprocal Insurers* (1) the Judicial Committee said that their order "involved no decision as to the power of the Parliament of Canada to enact s. 1025 of the Criminal Code."

But in 1926 in the case of *Nadan v. The King* (2) a decision was for the first time given on the question whether the section was valid. It was held that the section was ultra vires and invalid. It is essential, however, to determine the ratio decidendi on which this judgment was based. The ratio decidendi is, in their Lordships' opinion, to be found in a comparatively short passage which follows a citation of the Privy Council Acts of 1833 and 1844, and which is of so vital an import that it must be here quoted in full:—

"Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned

(1) [1924] A. C. 328, 348.

(2) [1926] A. C. 482, 492, 495.

exclusively to the Legislatures of the Provinces ; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of ' the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.' But however widely these powers are construed they are confined to action to be taken in the Dominion ; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that ' any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' In their Lordships' opinion s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute ; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way : see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106."

The judgment then goes on to review a number of authorities and thus concludes : " Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their Lordships have reached upon principle, and that, so far as they go, they support that conclusion."

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On a careful consideration of the judgment of the Board in *Nadan's* case, their Lordships are of opinion that the judgment was based on two grounds only: (1.) that s. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865; (2.) that it could only be effective if construed as having an extra-territorial operation, whereas according to the law as it was in 1926 a Dominion statute could not have extra-territorial operation. These two difficulties as the law then stood could only be overcome by an Imperial statute: the Australian and South African Acts were cited as illustrations of Imperial statutes containing clauses apt to define or limit this prerogative. Such, their Lordships think, is the meaning of the decision in *Nadan's* case: they do not find in it any clear or precise determination of what, if these two fundamental difficulties had been removed, would have been held to have been the true effect of the Act, nor can their Lordships say how, apart from these objections, the Judicial Committee would have decided the issue whether or not the Act had given the Canadian Legislature power to enact s. 1025.

Their Lordships have now to decide that very same question and to decide it, as they conceive, without any direct help or guidance from earlier decisions of the Judicial Committee, now that the Statute has removed the two difficulties which were decisive in *Nadan's* case. The relevant clauses of the Statute which have this effect are as follows:—

“ 2.—(1.) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

“ (2.) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or

regulation in so far as the same is part of the law of the Dominion.

" 3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

" 7.—(1.) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

" (2.) The provisions of section 2 of this Act shall extend to the laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

" (3.) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

What is the extent of the legislative competence in the relevant regard conferred on the Canadian Parliament, putting out of question the limitations which are now removed, must be ascertained from the words of the constituent Act. In construing the words of that Act, it must be remembered what the nature and scope of the Act are. They are indicated in the words used by Lord Loreburn L.C. in delivering the judgment of the Judicial Committee in *Attorney-General for Ontario v. Attorney-General for Canada* (1): "In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."

The same principle was recognized in the following language used in *Hodge v. The Queen* (2) in respect of the powers of

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(1) [1912] A. C. 571, 581.

(2) 9 App. Cas. 117, 132.

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Provincial Legislatures : " When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

The same language can properly be used in regard to the Dominion Parliament, to which indeed the passage just quoted was applied in *Attorney-General for Canada v. Cain*. (1) That was a case in which it was held that the power to make laws for the peace, order and good government were wide enough to enable the Dominion Parliament to pass a statute vesting in the Dominion Executive the prerogative power to expel and deport aliens. Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards v. Attorney-General for Canada*: (2) " Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. ' The Privy Council, indeed, has laid down that

(1) [1906] A. C. 542.

(2) [1930] A. C. 124, 136.

Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony': see Clement's Canadian Constitution, 3rd ed., p. 347."

No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or Colonial matters that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms or by necessary intendment, but it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite power by an Imperial Act likewise giving the power either by express terms or by necessary intendment. In the matter now in question it is beyond question that s. 17 of the Canadian Act is expressed in precise terms. The next question is whether s. 91 of the Act invests the Dominion Parliament, in cases within its jurisdiction, with the power to regulate or prohibit the appeal to the King in Council. Their Lordships are of opinion that the Act does invest the Dominion Parliament with these powers. It does not indeed do so by express terms, but it does so by necessary intendment. Sect. 91 of the Act, read along with the rest of the Act, is, according to its true construction in their Lordships' opinion, apart from the limitations already referred to, intended to make and is apt to make the Dominion Legislature supreme and endow it with the same authority as the Imperial Parliament, within the assigned limits of subject and area, just as it was said in *Hodge v. The Queen* (1) that s. 92 of the Act had that effect in regard to the Provincial

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Legislatures. It is true that before the Statute, the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by s. 129 of the Act, and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the Statute, a section which excludes from the competence of the Dominion and Provincial Parliaments any power of "repeal, amendment or alteration" of the Act. But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government: its Legislature was invested with all necessary powers for that purpose by the Act, and what the Statute did was to remove the two fetters which have already been discussed.

Among the powers which go to constitute self-government there are necessarily included powers to constitute the Law Courts and to regulate their procedure and to appoint their judges: save for the provisions of the Act, these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of justice: but by the Act these powers are vested in the Dominion Legislature, and thus pro tanto the prerogative is merged in the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from

Canadian Courts are within the legislative control of Canada, that is of the Dominion or the Provinces as the case may be. Even conditions of the appeal "as of right" to the Privy Council have been dealt with by the Parliaments of Quebec and Ontario, acting under the powers vested in them under the Constitutional Act, 1791.

It may now be considered whether there is since the Statute any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as according to the contentions on behalf of the petitioners it should be treated, as being something quite special and as being a matter standing, as it were, on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court: if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian Courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which

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become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

Their Lordships can see no valid reason since the Statute why the power to regulate or prohibit this type of appeal should not be held to be vested in the Dominion Parliament by the Act, with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships do not construe the decision in *Nadan's* case (1) as involving the negation of that general power: the view there stated that the prerogative power to admit appeals could only be abrogated by an Imperial Statute was in their Lordships' opinion based on the special grounds that it would affect matters not confined locally to Canada and would contravene an Imperial Act. Before 1867, it had been held in *Cuillier v. Aylwin* (2) that the Constitution Act of 1791 had conferred power on the Canadian Legislature to take away the prerogative right of appeal: that decision was indeed criticized in the case of *In re Louis Marois* (3), but the ground of actual criticism or perhaps dissent was not based on the general limits of power of the Canadian Legislature, but on the view that the relevant enactment of that Legislature was not sufficiently express in its terms: after 1867 the same ground for denying the validity of the enactment there in question was taken in *Cushing v. Dupuy* (4), as already explained.

It was further contended on behalf of the petitioners that if the Imperial Parliament desired to regulate in a constitutional enactment the prerogative right of petitioning for leave to appeal to the King in Council, an entirely different method of dealing with the problem was adopted, as was done in s. 74 of the Commonwealth of Australia Act, 1900, and in the South African Act. It is difficult to see how light can be thrown on the construction of the Act of 1867 by comparing an entirely different Act of 1900. But in any case the contrary argument may be drawn from the

(1) [1926] A. C. 482.

(2) 2 Knapp, 72.

(3) 15 Moo. P. C. 189.

(4) 5 App. Cas. 409.

Commonwealth Act: the truer view may well be that the express limitation inserted in the Act of 1900 was so inserted because the general powers conferred on the Commonwealth by that Act would have included the abrogation of the prerogative appeal if the specific limitation had not been expressed. But it is to be noted also that the Commonwealth was invested with power to alter or amend the provisions of the Commonwealth Act relating to the prerogative appeals. A similar power is given in the South African Constitution. In the Report of the Imperial Conference, 1926, at p. 19, it is stated that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals (i.e., to the Judicial Committee of the Privy Council) should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."

Their Lordships have in this judgment been dealing only with the legal position in Canada in regard to this type of appeal in criminal matters. It is here neither necessary nor desirable to touch on the position as regards civil cases.

For all these reasons their Lordships are of opinion that the petition should be dismissed. As they are of this opinion on the sole ground that the petition is barred by s. 17 of the amended Criminal Code, it is not necessary to discuss the merits of the petition.

In the result their Lordships, being of opinion that the petition should be dismissed, will humbly so advise His Majesty.

Solicitors for petitioners: *Clifford-Turner & Co.*

Solicitors for respondent: *Blake & Redden.*

Solicitors for Attorney-General of Canada: *Chas. Russell & Co.*

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J. C.* MARITIME NATIONAL FISH, LIMITED . APPELLANTS ;
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ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Frustration of Contract—Frustration due to act of repudiating party—Chartered trawler—Want of Government licence.

The respondents were owners and the appellants were charterers of a steam trawler which was fitted with, and could operate as a trawler only with, an otter trawl. By the charterparty the vessel could be used only in the fishing industry. The charterparty was renewed for a year from October 25, 1932. At that date both parties knew that a Canadian statute, which was applicable, made it an offence to leave a Canadian port with intent to fish with a vessel using an otter trawl, except under licence from the Minister. In March, 1933, the appellants applied to the Minister for licences for five trawlers which they were operating. The Minister intimated that only three licences would be granted, and requested the appellants to name the three trawlers in respect of which the three licences should be granted. The appellants named three trawlers, excluding the trawler now in question, and accordingly licences were granted for those three only. The appellants thereupon claimed that they were no longer bound by the charterparty, and to an action claiming the charter hire pleaded that the charterparty had become impossible of performance and their obligations under it ended :—

Held, that there had been no frustration of the charterparty, as the absence of a licence was due to the election of the appellants, who remained liable for the hire.

Krell v. Henry [1903] 2 K. B. 740 commented on.

Judgment of the Supreme Court of Nova Scotia affirmed.

APPEAL (No. 103 of 1934) from an order of the Supreme Court of Nova Scotia En Banco (June 9, 1934) reversing an order of the Supreme Court of Nova Scotia (January 19, 1934).

The facts appear from the judgment of the Judicial Committee.

* *Present* : LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, and LORD WRIGHT.

1935. March 25. *C. B. Smith K.C.* and *Frank Gahan* for the appellants.

H. U. Willink K.C. and *Mocatta* for the respondents.

1935. April 12. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellants were charterers of a steam trawler the *St. Cuthbert* which was the property of the respondents. The charterparty, dated October 25, 1928, had originally been entered into between the respondents and the National Fish Company, Ltd., but was later by agreement taken over by the appellants. It was for twelve calendar months, but was to continue from year to year unless terminated by three months' notice from either party, the notice to take effect at the end of one of the years. It was expressly agreed that the trawler should be employed in the fishing industry only; the amount of monthly hire was to be fixed on a basis to include a percentage of the purchase price, and also operating expenses. There was an option given to the charterers to purchase the trawler.

By letters dated July 6 and 8, 1932, exchanged between the appellants and respondents, it was agreed that the charterparty as then existing should be renewed for one year from October 25, 1932, but at a rate of monthly hire which was 25 per cent. lower than that previously paid: the amount so agreed came to \$590.97 per month. It was also then agreed that in the event of the appellants giving notice on or before July 25 in any year that they did not intend to renew, they should further give notice whether or not they intended to exercise the option to purchase. In fact the appellants gave notice on January 27, 1933, that they did not intend to renew the charter or to purchase the vessel.

When the parties entered into the new agreement in July, 1932, they were well aware of certain legislation consisting of an amendment of the Fisheries Act (c. 73 Revised Statutes of Canada, 1927) by the addition of s. 69A, which in substance made it a punishable offence to leave or depart from any port

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in Canada with intent to fish with a vessel that uses an otter or other similar trawl for catching fish, except under licence from the Minister: it was left to the Minister to determine the number of such vessels eligible to be licensed, and Regulations were to be made defining the conditions in respect of licences. The date of this amending s. 69A was June 14, 1929. Regulations were published on August 14, 1931, former Regulations having been declared invalid in an action in which the appellants had challenged their validity.

The *St. Cuthbert* was a vessel which was fitted with, and could only operate as a trawler with, an otter trawl.

The appellants, in addition to the *St. Cuthbert*, also operated four other trawlers, all fitted with otter trawling gear.

On March 11, 1933, the appellants applied to the Minister of Fisheries for licences for the trawlers they were operating, and in so doing complied with all the requirements of the Regulations, but on April 5, 1933, the Acting Minister replied that it had been decided (as had shortly before been announced in the House of Commons) that licences were only to be granted to three of the five trawlers operated by the appellants: he accordingly requested the appellants to advise the Department for which three of the five trawlers they desired to have licences. The appellants thereupon gave the names of three trawlers other than the *St. Cuthbert*, and for these three trawlers licences were issued, but no licence was granted for the *St. Cuthbert*. In consequence, as from April 30, 1933, it was no longer lawful for the appellants to employ the *St. Cuthbert* as a trawler in their business. On May, 1 1933, the appellants gave notice that the *St. Cuthbert* was available for re-delivery to the respondents; they claimed that they were no longer bound by the charter.

On June 19, 1933, the respondents commenced their action claiming \$590.97 as being hire due under the charter for the month ending May 25, 1933: it is agreed that if that claim is justified, hire at the same rate is also recoverable for June, July, August, September and October, 1933.

The main defence was that through no fault, act or omission on the part of the appellants, the charterparty contract became impossible of performance on and after April 30, 1933, and thereupon the appellants were wholly relieved and discharged from the contract, including all obligations to pay the monthly hire which was stipulated.

The defence succeeded before the trial judge, Doull. J. His opinion was that there had been a change in the law, including the Regulations, which completely changed the basis on which the parties were contracting. He thought it "not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease." He also thought the appellants were not bound to lay up another boat instead of the *St. Cuthbert*.

It seems that the learned judge proceeded on the footing that the change of law was subsequent to the making of the contract, whereas it was in fact anterior to the agreement of 1932, under which the trawler was being employed at the time the licence was refused.

This judgment was unanimously reversed by the judges in the Supreme Court En Banco. The judges of that Court rightly pointed out that the discharge of a contract by reason of the frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party. They held that there was in this case no discharge of the contract for one or both of two reasons. In the first place they thought that the appellants when they renewed the charter in 1932 were well informed of the legislation, and when they renewed the charter at a reduced rate and inserted no protecting clause in this regard, must be deemed to have taken the risk that a licence would not be granted. They also thought that if there was frustration of the adventure, it resulted from the deliberate act of the appellants in selecting the three trawlers for which they desired licences to be issued.

Their Lordships are of opinion that the latter ground is sufficient to determine this appeal. Great reliance was placed

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J. C. in the able argument of Mr. Smith for the appellants on
 1935 *Bank Line, Ltd. v. Arthur Capel & Co. (1)*, and in particular on
 MARITIME the judgment of Lord Sumner in that case. That case was in
 NATIONAL principle very different from this, because the vessel which was
 FISH, LD. chartered in that case was actually taken from the control
 v. of the shipowners for a period such as to defeat the
 OCEAN contemplated adventure: it was in consequence impossible
 TRAWLERS, during that time for the shipowners to place the vessel at
 LD. the charterers' disposal at all. In the present case the

St. Cuthbert was not requisitioned: it remained in the
 respondents' control, who were able and willing to place it
 at the appellants' disposal: what happened was that the
 appellants could not employ the *St. Cuthbert* for trawling with
 an otter trawl. No doubt it was expressed in the charter-
 party that the *St. Cuthbert* should be employed under the
 charter in the fishing industry only, but the respondents
 did not warrant the continued availability of the vessel for
 that employment nor was payment of hire made dependent
 on that condition. The *St. Cuthbert* was available for the
 appellants to make such use of her as they desired and were
 able to make. This case is more analogous to such a case
 as *Krell v. Henry (2)*, where the contract was for the hire
 of a window for a particular day: it was not expressed but
 it was mutually understood that the hirers wanted the
 window in order to view the Coronation procession: when
 the procession was postponed by reason of the unexpected
 illness of King Edward, it was held that the contract was
 avoided by that event: the person who was letting the
 window was ready and willing to place it at the hirer's disposal
 on the agreed date; the hirer, however, could not use it for
 the purpose which he desired. It was held that the contract
 was dissolved, because the basis of the contract was that
 the procession should take place as contemplated. The
 correctness of that decision has been questioned, for instance,
 by Lord Finlay L.C. in *Larrinaga v. Société Franco-Américaine
 des Phosphates (3)*: Lord Finlay observes: "It may be that

(1) [1919] A. C. 435.

(2) [1903] 2 K. B. 740.

(3) (1922) 29 Com. Cas. 1, 7.

the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract."

The authority is certainly not one to be extended: it is particularly difficult to apply where, as in the present case, the possibility of the event relied on as constituting a frustration of the adventure (here the failure to obtain a licence) was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service for which the contract provides at the other parties' disposal and are able and willing to do so. In *Hirji Mulji v. Cheong Yue Steamship Co.* (1) Lord Sumner speaks of frustration as "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands." In a case such as the present it may be questioned whether the Court should imply a condition resolute of the contract (which is what is involved in frustration) when the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did, was present in their minds when they made the contract.

This was one of the grounds on which the judges of the Supreme Court were prepared to decide this case. Their Lordships do not indicate any dissent from the reasoning of the Supreme Court on this point, but they did not consider it necessary to hear a full argument, or to express any final opinion about it, because in their judgment the case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the *St. Cuthbert* from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the *St. Cuthbert* as one, in which event

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a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and the respondents, that the appellants were operating other trawlers to three of which they gave the preference. What matters is that they could have got a licence for the *St. Cuthbert* if they had so minded. If the case be figured as one in which the *St. Cuthbert* was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the *St. Cuthbert*. The essence of "frustration" is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of Lord Sumner in *Bank Line, Ltd. v. Arthur Capel & Co.* (1) What he says is: "One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it."

A reference to the record in the House of Lords confirms Lord Sumner's view that the Court below had not considered the point, nor had they evidence or material for its consideration. Indeed, in the war time the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability. However, the point does directly arise in the facts now before the Board, and their Lordships are of

(1) [1919] A. C. 435, 452.

opinion that the loss of the *St. Cuthbert's* licence can correctly be described, quoad the appellants, as "a self induced frustration." Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co.* (1) quotes from Lord Blackburn in *Dahl v. Nelson, Donkin & Co.* (2), who refers to a "frustration" as being a matter "caused by something for which neither party was responsible": and again (3) he quotes Brett J.'s words, which postulate as one of the conditions of frustration that it should be "without any default of either party." It would be easy, but is not necessary, to multiply quotations to the same effect. If either of these tests is applied to this case, it cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure: the appellants cannot rely on their own default to excuse them from liability under the contract.

On this ground, without determining any other question, their Lordships are of opinion that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents: *William A. Crump & Son.*

(1) [1926] A. C. 497, 507. (2) (1881) 6 App. Cas. 38, 53.

(3) [1926] A. C. 508.

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ON APPEAL FROM THE SUPREME COURT OF TRINIDAD
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Spirits and Spirit Compounds Ordinance (Trinidad and Tobago) c. 198, ss. 46 to 48—Public Warehouse—Destruction of Warehouse and Spirits—Right to sue for warehousing charges.

Rum, stored in respondent's name in a Government public warehouse in Port of Spain from and after August 30, 1930, was destroyed with the warehouse by fire on June 25, 1932. In a suit by the Attorney-General of Trinidad and Tobago against the respondents for warehousing charges at the monthly rental rate provided for in the rules made under the Ordinance :—

Held, that the Ordinance provided a complete scheme for the recovery of warehousing charges from the owner of spirits warehoused on his withdrawal or re-warehousing of the spirits : a right to recover charges by suit was not contemplated and could not be extracted from the terms of the Ordinance, a contingency such as the present was not provided for and the Government had no right of suit against the respondents.

Judgment of the Supreme Court affirmed for a different reason : there was not a frustrated agreement but no agreement at all, the rights of the parties being wholly prescribed by the Ordinance.

APPEAL (No. 85 of 1934) from a decree of the Supreme Court of Trinidad and Tobago (June 15, 1934).

The facts of the case are stated in the judgment of the Judicial Committee.

1935. May 3, 10. *T. J. O'Connor K.C.* and *Kenelm Preedy* for the appellant. [Referred to ss. 53, 46 to 48, and the definition in s. 2 of the Ordinance.] The statute has empowered the Treasurer to fix charges and he has by notice in the

**Present* : LORD BLANESBURGH, SIR LANCELOT SANDERSON, and SIR SIDNEY ROWLATT.

Royal Gazette fixed the charges at a monthly rate. The right to sue is inherent in the right to make charges. The statute provides a remedy in two cases only: (a) on withdrawal, and (b) after delay of two years. Where a statute gives a right but provides no particular form of remedy, a party may proceed by action at common law: *Wolverhampton New Waterworks Co. v. Hawkesford*. (1) There is no obligation to deposit in the Government warehouse. A party contracting must be held to contract on terms of which he has express notice.

Schiller K.C. and *Essenhugh* for the respondents. The statute is complete and provides both the remedy and the machinery, and there is no other remedy: *Doe d. Bishop of Rochester v. Bridges*. (2) As a buyer, and not a distiller, the only warehouse open to the respondents was the Government warehouse. A depositor cannot get his spirits without payment of charges. The sole right the Government has is to sell the spirits after the expiry of two years from date of deposit if charges are not paid. There is no right to sue. [Reference was made to the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 492 to 501; Scrutton on Charterparties, 10th ed., p. 327; and *School Board for London v. Wright*. (3)]

T. J. O'Connor K.C. replied.

May 30. The judgment of their Lordships was delivered by SIR LANCELOT SANDERSON. This is an appeal by the Attorney-General of Trinidad and Tobago against a judgment of the Supreme Court of Trinidad and Tobago, delivered on June 15, 1934, by the learned Chief Justice.

The appeal raises an important question—namely, whether the sums of money claimed in the suit are payable by the respondents in respect of warehouse charges for rum, which was stored in the respondents' name in a Government public warehouse in Port of Spain which together with the said rum was destroyed by fire.

The suit was brought on August 30, 1932, by the above

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(1) (1859) 6 C. B. (N. S.) 336,

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(2) (1831) 1 B. & Ad. 847, 859.

(3) (1884) 12 Q. B. D. 578.

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mentioned Attorney-General against the respondent company to recover the sum of 1084*l.* 15*s.* (a sum equal to \$5206.80) alleged to be "payable to the Collector of Customs and Excise for the warehousing of goods, viz.: rum in a public warehouse in the City of Port of Spain." Particulars were delivered with the writ of summons, setting out the description of the "packages," the number of hogsheads and puncheons in respect of each "package," the dates when the goods were warehoused and the amounts due in respect thereof.

The fire, which destroyed the warehouse and the rum, occurred on June 25, 1932, and with the exception of one item, which learned counsel suggested was a misprint, the charges were for a number of completed months in respect of each item in the particulars. None of the said "packages" had been in the warehouse for two years: the earliest date of deposit given in the particulars being August 28, 1930. Further particulars of the claim were delivered on November 23, 1932, and were as follows:—

"(a) The moneys claimed by the plaintiff in the above action are payable to the Crown under contracts to pay warehouse rent at the rates of two shillings per puncheon and one shilling per hogshead per month for rum warehoused by the defendant company at the Government Rum Bond in this City.

(b) These contracts are to be implied from the facts that the defendant company warehoused certain quantities of rum in the said Rum Bond and caused other quantities of rum already warehoused by other persons in the said Bond to be transferred into its name as owner thereof in the books of the said Bond with full knowledge that the charges above mentioned were payable to the Crown under the Spirits and Spirit Compounds Ordinance Cap. 198 and the notice signed by the Treasurer which appeared at p. 449 of the Royal Gazette published on the 3rd day of August, 1922, or alternatively without reasonable grounds for inferring that the same was being warehoused free of charge.

(c) The defendant company is fully aware of the particulars of rum warehoused by it and of rum transferred to its name

as owner as above mentioned. It is unnecessary therefore to supply those particulars."

The defence, which was delivered on January 3, 1933, was as follows :—

" 1. The defendant company admits that the rum referred to in the particulars to the statement of claim was warehoused in a public warehouse between the dates set out in such particulars.

2. There was no contract between the defendant company and the Crown to pay warehouse rent for or in respect of the said rum as alleged or at all.

3. The defendant company will contend that there is in law no liability on them under or by virtue of the Spirits and Spirit Compounds Ordinance, Chapter 198 or at all to pay the said or any charges for or in respect of the warehousing of the said rum or any part thereof.

4. The defendant company is not indebted to the plaintiff in the sum claimed therein or at all."

On November 28, 1933, the plaintiff's solicitor gave notice in writing that the plaintiff would apply to amend the particulars by adding a further clause (*d*) in the following terms :—

" d. in the alternative the obligation of the defendant company to pay the moneys claimed is statutory and arises under s. 46 of the Spirits and Spirit Compounds Ordinance Cap. 198 and the said notice at p. 449 of the Royal Gazette for 1922."

At the trial the amendment was allowed. It was agreed that the warehouse in which the rum was stored was a Government public warehouse and that the fire which took place should be attributed to inevitable accident.

It appears that the rum was originally deposited in the said warehouse by one H. F. Smith, a licensed distiller and a director of the respondent company and shortly after the deposit it was transferred into the name of the respondent company, who were the owners thereof, and for the purpose of the suit it was admitted by the respondent company that on the dates mentioned in the said particulars the respondent company had warehoused in the " rum bond " (i.e., the

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J. C. Government public warehouse) the spirits contained in the packages mentioned in the said particulars against the respective dates.

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The learned Chief Justice entered judgment for the defendants with costs.

He based his decision on the course of dealing.

The ground thereof is concisely and clearly stated at the end of his judgment as follows :—

“ The course of dealing here is decisive. No depositor of rum is ever asked for, or pays, rent till re-warehousing or clearing takes place (Mr. Ramirez’ evidence shows that) ; and this course of dealing though it cannot affect the right to sue in the abstract can and does constitute agreement as to when payment shall fall due. On the rum with which this case is concerned the time agreed on for payment had not arrived and before the time did arrive the rum and the warehouse, the whole of the subject matter of this contract on both sides, were destroyed by an inevitable accident not provided against in this regard by the contract. Clearly the principle of *Taylor v. Caldwell* (1) ; *Appleby v. Myers* (2), and *Civil Service Co-operative Society, Ltd. v. General S. N. C.* (3) —it is indeed the principle of *Cutter v. Powell* (4)—applies and, the loss lying where it has fallen, nothing not specifically due and payable can be recovered at all. There must be judgment for the defendants with costs.”

The learned counsel for the appellant rested his case mainly on the allegation that the obligation of the respondent company to pay the moneys claimed was statutory and arose under s. 46 of the said Ordinance and the said notice in the Gazette of 1922.

He referred to the three classes of cases in which a liability may be established founded upon a statute, which are referred to in the judgment of Willes J. in *Wolverhampton New Waterworks Co. v. Hawkesford*. (5)

The three classes are there stated as follows :—

(1) (1863) 32 L. J. (N. S.) Q. B. 164 ; 3 B. & S. 826.

(2) (1867) L. R. 2 C. P. 651.

(3) [1903] 2 K. B. 756.

(4) (1795) 6 T. R. 320.

(5) 6 C. B. (N. S.) 336, 356.

"One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

It was argued on behalf of the appellant that the present case comes within the first of the above mentioned three classes.

The learned counsel for the appellant relied also upon the implied contract set out in the said particulars delivered on November 23, 1932.

The main argument presented on the appeal on behalf of the respondent company was that the said Ordinance contains a complete scheme by which the collection of duties on spirits and the warehousing of the said spirits are regulated, that the ordinance provides specific means for the recovery of the warehouse charges, which do not include a right in the Government to sue for the said charges. The learned counsel for the respondent company relied upon the principle stated in the well known passage in the judgment of Lord Tenterden C.J. in *Doe d. Bishop of Rochester v. Bridges* (1), which is as follows:—

"Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

It therefore becomes necessary to examine the provisions of

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the ordinance chapter 198. It was made in September, 1922, and is cited as the "Spirits and Spirit Compounds Ordinance" and it relates to the manufacture, removal, warehousing and sale of spirits and compounds of spirits.

It is provided in the interpretation section, namely, s. 2, that the word "Regulations" means the regulations made or prescribed under this or any other excise Ordinance by the Treasurer with the assent of the Governor, and that "Warehouse" means a secure place approved by the Treasurer for the service of the public for the deposit of spirits liable to a duty of excise without the payment of such duty.

Sect. 31 provides for duty to be paid on spirit, not warehoused within a certain time.

Part V. of the Ordinance deals with "Warehouses."

Sect. 46, which is the first section of this part of the Ordinance, provides as follows:—

"46. Spirits, the produce of the Colony, shall only be warehoused in a public warehouse to be named for that purpose by the Treasurer, and subject to such rules and regulations and to the payment of such charges as the Treasurer shall from time to time direct, with the approval of the Governor; and it shall be lawful for the owner of any spirits to warehouse the same, and a document, in such form as the Treasurer shall direct, shall be passed by the owner or the authorized agent of the same for warehousing thereof."

In pursuance of this section notice was given in the Royal Gazette for 1922 at p. 449 that "from the 1st September, 1922, the following will be the warehouse charges for rent on rum stored in excise warehouses, viz.: 1s. per hogshead per month or any part of a month—2s. per puncheon per month or any part of a month." For the purpose of this case it may be taken that the words "excise warehouses" include the warehouse in question which comes within the above mentioned definition in the Ordinance.

It is upon the terms of s. 46 coupled with the said notice that the appellant relies for the support of his first contention—namely, that the respondent company is under a statutory

liability to pay the warehouse charges and that the appellant is entitled to recover by means of a suit such charges as were incurred in respect of the period during which the rum was warehoused, even though the said rum was destroyed by fire and could not be delivered to the owner thereof.

The respondent company, however, relies upon other sections which follow the above mentioned section for the purpose of showing that the Ordinance provides a special and particular remedy for enforcing the Government claim in respect of the warehouse charges.

Sect. 47 provides that—

“ 47. All spirits shall be cleared either for use in the Colony or for exportation within two years from the day on which the same were warehoused, unless the owner of such spirits is desirous of re-warehousing the same, in which case, at the expiration of two years from the date of warehousing, the same shall be examined by the proper Officers and the quantity so found shall be re-warehoused in the name of the then owner in the same manner as on first warehousing. The warehouse rent and charges due up to the time of re-warehousing shall be paid before the goods shall be re-warehoused.”

And s. 48 is in the following terms :—

“ 48. If any warehoused spirits are not duly cleared for use in the Colony, or to be carried coastwise, or exported, or re-warehoused, and the warehouse rent due thereon paid as provided at the expiration of two years from the previous entry and warehousing thereof, the same shall, after one month's notice by advertisement in the Royal Gazette, signed by the Treasurer or the Sub-Treasurer, giving the number and marks on the package or packages, and the owner's name, be sold, and the proceeds thereof be appropriated in the first instance for the payment of warehouse rent due and owing thereon, after which the balance of the proceeds of sale, if any, shall be paid to the owner of the spirits sold, on a claim being made for it in the regular manner. If such claim is not made within six months of the date of sale thereof, such balance of proceeds of sale shall be carried to the credit of the general revenue of the Colony.”

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It appears to their Lordships that the terms of these two sections make it clear that the owner of the spirits which were warehoused in pursuance of the Ordinance would be entitled to withdraw the spirits at any time he wished : if he did withdraw the spirits he would have to pay the warehouse charges which were due in respect thereof at the time of withdrawal and the officer in charge of the warehouse would not allow the spirits to be withdrawn until the warehouse charges were paid.

The reference therefore in the notice as to the charges " per month or any part of a month " is necessary to cover the case where the owner withdraws the spirits before the expiration of the two years' limit mentioned in s. 47.

It is also clear that under the terms of the last mentioned sections the owner of the deposited spirits is entitled to keep the spirits in the warehouse for the specified period of two years and the Government cannot compel him to take delivery at an earlier period ; this was not disputed at the hearing of the appeal.

The Government therefore is fully protected as to the warehouse charges if the owner wishes to withdraw the spirits at a date earlier than the two years, because the owner must pay the charges in order to obtain delivery of the spirits.

What then is the position if the owner of the goods or his transferee allows the spirits to remain in the warehouse for the specified two years ?

When the period of two years expires the owner must take delivery of the spirits and pay the charges which are due, or he must re-warehouse the same and pay the warehouse rent and charges due up to the time of re-warehousing. It is provided that such charges shall be paid before the spirits are re-warehoused.

If the owner of the deposited spirits at the expiration of the two years fails to take one or other of the two above mentioned courses, the Government may put in force the provisions of s. 48 and sell the spirits, and the proceeds of the sale will be appropriated in the first instance to the payment of the warehouse rent due and owing thereon.

It appears therefore that whether the owner of the spirits takes delivery thereof before the expiration of the two years, or allows the spirits to remain for two years in the warehouse, the Government are in a position to recover the warehouse charges, without any procedure such as a suit to recover them from the owner of the spirits. The charges, specified in the notice—namely, 1s. per hogshead or 2s. per puncheon for the whole of the two years, would amount to a trifling sum as compared with the amount which would be realized by a sale of the rum unless it had greatly deteriorated, and therefore the Government would be fully protected as to the warehouse charges.

In that respect it is material to notice that the re-warehousing is only to take place after the spirit has been examined by the proper officers, who would be able to ascertain whether any deterioration had taken place.

There are other sections to which their Lordships' attention was drawn by the learned counsel for the respondent company in support of his argument: as for instance, ss. 53, 54 and 55.

Their Lordships do not think it necessary to set out their terms in full.

They refer to the delivery of the spirits out of the warehouse in certain cases and to the removal of the spirits from one public warehouse to another public warehouse, and in every case there are provisions for securing before the spirits are removed either the payment of the warehouse charges or the execution of a bond with a surety in a sum equal to the duty chargeable on such spirits for the due arrival and re-warehousing of the said spirits at the place of destination.

These sections, in their Lordships' opinion, support the contention of the respondent company.

There is not to be found in the Ordinance any express provision giving the Government or its proper officer the right to sue for the warehouse charges.

If such right exists, it has to be implied. Apart from the matters already referred to, there appears to be great difficulty in implying such a right.

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As for instance, there is no doubt that the owner of spirits deposited in the public warehouse is entitled to transfer his interest in the spirits to a third party, without removing the spirits from the public warehouse. What would be the position on such a transfer taking place?

Could the Government or its proper officer on receiving notice of the transfer recover by suit from the transferor the warehouse charges incurred up to the date of the transfer, although the Government still retained possession of the spirits in the public warehouse and are bound so to retain them until the transferee demanded delivery or until the expiration of two years from the time of deposit?

Or again, in the case of a transfer of the owner's interest in the spirits to a transferee, while the spirits remained in the public warehouse, could the transferee be sued in debt at any time before the two years expired for the amount of the warehouse charges which were incurred not only during the period when the transferee was owner, but also during the period before the transferee became owner?

No provision is made in the Ordinance for such contingencies, and in the absence of a special contract giving the Government the right to sue for the charges, which does not exist in the present case, their Lordships are of opinion that a right to recover the warehouse charges by means of a suit for debt was not contemplated by the draftsman of the Ordinance, and cannot be extracted from the terms thereof.

It has to be remembered, as already pointed out, that the warehouse charges must be comparatively small as compared with the value of the spirit: e.g., the charge would be 24s. only for the warehousing of a hogshead for two years, and it is fairly clear from the provisions of the Ordinance that it was intended that such warehouse charges should be collected in the manner indicated by the above mentioned sections, which would obviously be the most convenient, businesslike and inexpensive way. For these reasons their Lordships are of opinion that the contention of the respondent company on this part of the case is correct, and that the clauses of the

Ordinance do provide a special and particular manner for the recovery of the warehouse charges and do not give the Government or its proper officer a right to sue for the same.

There remains the contention of the appellant that the respondent company is liable to be sued for the warehouse charges which are claimed, by reason of contracts which are said to be implied from the facts set out in para. (b) of the particulars delivered on November 23, 1932. The difficulty in the appellant's way on this part of the case is that there is no suggestion of any contract which is independent of the terms of the Ordinance. In fact the argument was that the contract is to be implied, because the respondent company warehoused the said quantities of rum with full knowledge that the said charges were payable under the said Ordinance.

If however the construction which their Lordships have placed upon the terms of the above mentioned clauses is correct, as in their opinion it is, the said charges did not become recoverable under the said Ordinance, in the manner alleged by the appellant, but only on the happening of one or other of the contingencies which have already been referred to.

Their Lordships therefore are of opinion that the last mentioned ground of the appellant's appeal cannot be sustained. The truth seems to be that such a contingency as has arisen in this case was not contemplated or provided for in the Ordinance.

Their Lordships agree with the conclusion at which the Chief Justice arrived—namely, that judgment should be entered for the defendants; but with respect to the learned Chief Justice they are not prepared to adopt the ground of his decision as stated above.

It is interesting to note that the course of dealing in general has been in accordance with the construction which their Lordships have placed upon the sections of the Ordinance, but their Lordships do not find any evidence of a course of dealing between the Government and the respondent company which would justify them in drawing

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J. C. the inference that an agreement had been made between
1935 them as indicated by the learned Chief Justice.

ATTORNEY- For the above mentioned reasons their Lordships are of
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Solicitors for appellant : *Burchells*.

Solicitors for respondents : *J. N. Mason & Co.*

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